NO. 80-5887

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

RICHARD H. WHITE,

Petitioner,

-v-

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Can a court require that an application for attorneys' fees filed under 42 U.S.C. §1988, which authorizes fees "as part of the costs," be filed within the 10 days allowed by Rule 59(e) of the Federal Rules of Civil Procedure for a motion to alter or amend a judgment, (A) in disregard of the plain language of §1988, of this Court's decision in Hutto v. Finney, and of Rule 54(d) which governs the allowance of costs, and (B) in disregard of this Court's decision in Spragne v. Ticonic National Bank holding that a fee application is "not a request for a modification of the original decree," and of Rule 54(b) which allows entry of a final judgment on fewer than all claims?

II. May a court, in imposing a 10-day time limitation on the filing of a fee application, require counsel to negotiate a fee award concurrently with negotiations directed at settling the merits of a case, despite the ethical conflicts that such an obligation imposes on class counsel?

LIST OF THE PARTIES

The petitioner, the plaintiff-appellee below, is RICHARD H. WHITE, a resident of New Hampshire.

The respondents, the defendants-appellants below, are the NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, and its Commissioner, BENJAMIN C. ADAMS.

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REPORTED OPINIONS

The decision of the U.S. Court of Appeals for the First Circuit, entered on August 12, 1980, is reported at 629 F.2d 697 (1st Cir. 1980). A copy of the decision is attached hereto as Appendix A.

The decision of the U.S. District Court for the District of New Hampshire denying respondents' motion to vacate the consent decree, which decision was entered on October 1, 1979, and the decision of the District Court awarding fees to petitioner, entered on August 30, 1979, are both unreported. Copies of the decisions are attached hereto as Appendix B and Appendix C, respectively.

JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on August 12, 1980. On November 10, 1980, Justice Brennan signed an order extending the time for filing a Petition for a Writ of Certiorari to and including December 10, 1980. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The federal statute involved in this case is the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 as amended, which provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, Sections 1681-1686 of U.S.C. Title 20]...or Title VI of the Civil Rights Act of 1964 [Sections 2000d, et seq., of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves Rules 54(b), 54(d), 58 and 59(e) of the Federal Rules of Civil Procedure, which provide in whole or pertinent part:

Rule 54(b)

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 54(d)

> Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 58

> Entry of Judgment....Entry of the judgment shall not be delayed for the taxing of costs.

Rule 59(e)

> Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

The substantive merits of this case were resolved in a consent decree approved by the trial court on January 26, 1979. The issues presented here arise from the court of appeals' reversal of the trial court's award of attorneys' fees to petitioner's counsel under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 as amended [hereinafter "§1988" or the "Fees Act"].

This action was commenced in March, 1976, when petitioner, represented by counsel from New Hampshire Legal Assistance, filed a complaint alleging that respondents' procedures for processing unemployment compensation claims violated the due process clause of the Fourteenth Amendment and also violated the "when due" provision of the Social Security Act, 42 U.S.C. §503(a)(1). A-2, A-17. Petitioner's complaint was filed under 42 U.S.C. §1983. A-2. Jurisdiction was conferred on the district court by 28 U.S.C. § 1343(3)&(4). Id.

On May 11, 1976, petitioner's action was certified as a class action. Id. Following discovery and after a two-day bench trial in the fall of 1977, the district court entered a judgment on November 15, 1977 in favor of petitioner and his class, holding that respondents' administrative procedures were in violation of the "when due" provision of the Social Security Act. Id.

Respondents' thereafter filed an appeal from the trial court's decision on the merits. Id. While the appeal was pending, counsel for petitioner and his class and counsel for respondents initiated settlement negotiations. Id. In response to a motion filed by respondents in the court of appeals, the case was remanded "for the purpose of entertaining a consent decree." Id. During the negotiations, attempts

were made to settle the matter of fees and even to have petitioner's counsel waive attorneys' fees. A-18. But, as the district court later found, "[t]hese attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved [by the court] on January 26, 1979." Id.

Immediately following the entry of the consent decree, petitioner's counsel initiated efforts to reach a settlement on the award of attorneys' fees.[1] When the settlement negotiations ultimately proved to be unsuccessful, petitioner's counsel on June 7, 1979 moved for an award of attorneys' fees under 42 U.S.C. §1988. A-3. Respondents' counsel objected, and a hearing was held on August 21, 1979. A-3, A-18. At that hearing, respondents' counsel argued that petitioner was not truly the prevailing party, A-3, and he argued that the hourly rates used by petitioner's counsel in computing the fee request were too high, A-18. He also contended that he had expected that the fee claim would not be pursued. A-3. As summarized later by the court of appeals:

> "In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. [Petitioner] contended that [he] had expected the fees issue to be resolved through negotiation following the entry of judgment while [respondents] basically represented that [they] had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree 'proved nugatory.'" A-3 n.2.

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1. The settlement negotiations on the fee award were initiated by petitioner's counsel five days after the entry of the consent decree on the merits. See Itemized Bill in Support of Plaintiffs' Motion for Attorneys Fees at p.8, and see Plaintiffs' Objection to Defendants' Motion to Vacate Consent Decree at p.2, in the Court of Appeals Revised Joint Appendix at p.86 and p.105-c, respectively.

Although respondents' counsel thus argued that he had not expected the fee claim to be pursued after the entry of the consent decree on the merits, he also candidly conceded at the hearing that it would have been unethical to "hold a class action hostage or consent decree hostage for a waiver of attorneys fees."[2]

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2. Although the court of appeals' decision in this case does not reflect counsel's admission, counsel did rather fully discuss the ethical conflicts at two separate hearings in the trial court. These conflicts were first described by respondents' counsel at the fees hearing held on August 29, 1979:

> "[P]art of the problem including the attorneys' fees and the consent decree was that, in a seminar that was held, it seemed to be the concensus of those present [that] you could not hold a class action hostage or consent decree hostage for a waiver of attorneys' fees.
>
> "Now, I haven't seen anything lately on that, but it became my opinion, and I was warned by my brother counsel in my office, I should not be holding the consent action hostage to attorneys' fees because I might have an ethical problem and it should not be included in the consent decree. That was his opinion. He had been through the course. and I took his opinion." August 21, 1979 Fee Hearing Transcript at pp.20-21, in the Court of Appeals Revised Joint Appendix at pp.126-127.

At a subsequent hearing on October 1, 1979 to consider respondents' motion to vacate the consent decree, counsel for the respondents again volunteered to discuss the ethical problem:

> "I would add, Your Honor, again, I may be repeating myself from the last time we were here on the question of attorneys' fees, at that time I felt there was an ethical problem in discussion of the attorneys' fees, at least towards the end when the consent decree was finally signed. [W]hat I have read and what is being held is, if the attorneys' fees are going to a nonprofit corporation, rather than to the plaintiffs, that it's wrong to hold the attorneys' fees hostage to consent decree because the Court's Order goes to the plaintiff. And however the attorneys' fees go to the attorneys directly. [A]nd unlike other cases, if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here. And that's all I want to say." October 1, 1979 Motion Hearing Transcript at pp.2-3, in the Court of Appeals Revised Joint Appendix at pp.135-136.

Thereafter, subsequent to the submissions by counsel and the arguments and admissions at the fee hearing, the district court on August 30, 1979 overruled the objections raised by respondents' counsel to petitioner's fee request, and awarded "[r]easonable attorney's fees in the sum of $16,644,40...to [petitioner's] counsel." A-25.

On September 13, 1979, respondents filed a motion to vacate the consent decree, contending in part that the fee motion by petitioner's counsel had caught respondents "by surprise." A-3. After a hearing at which respondents' counsel again admitted the ethical problems surrounding concurrent negotiations of fees and the merits, see n.2 supra, the court rejected respondents' motion in a one-page order. A-3, A-16. Respondents then perfected their appeals from both the award of fees and from the denial of the motion to vacate, A-3, and the appeals were consolidated, A-4.

On appeal to the First Circuit, respondents argued for the first time that the fee request filed under the Fees Act by petitioner's counsel actually had been a motion to alter or amend judgment, and that it thereby was time-barred by the 10-day limitation in Rule 59(e) of the Federal Rules of Civil Procedure. Id. The First Circuit agreed, and thereby reversed the trial court's fee award. A-1 through A-15.

In order to apply Rule 59(e) to a fee request, the First Circuit had to characterize a fee award as an integral part of a substantive judgment on the merits, whether that substantive judgment was ordered by a court or obtained through a consent decree. By doing so, the First Circuit rendered a dual holding: "We hold that a fees award under 42 U.S.C. §1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time

limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e)." A-4 (emphasis added).

In applying Rule 59(e) to a fee request, the First Circuit rejected petitioner's two arguments that fee requests are not governed by the rule. Responding to petitoner's initial argument, the First Circuit held that a fee award could not be characterized, as it is defined in the Fees Act, "as part of the costs." A-5 through A-11. The First Circuit thereafter held that a fee request is not sufficiently collateral and independent so that it may be considered in an independent proceeding apart from and subsequent to the judgment on the merits. A-12, A-13.

In holding that a fee determination is an integral part of the merits of a lawsuit, the court ruled that, even in cases that are being negotiated, the issue of fees should be negotiated simultaneously with the issues on the merits: "Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations." A-15 (emphasis added). Perceiving no ethical conflicts flowing from this requirement, the First Circuit added that it did not necessarily "suggest that an attorney in the course of settlement negotiations need, or in every case may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree." Id.

Petitioner here requests this Court to issue a writ of certiorari to the U.S. Court of Appeals for the First Circuit, and to summarily reverse the First Circuit's decision or to set this case for plenary review.

REASONS FOR GRANTING THE WRIT

The First Circuit's application of Rule 59(e) to a fee request filed under the Fees Act is in direct conflict with the decisions of this Court, with the decisions of the Fifth, Seventh and Ninth Circuits, and with the exprens language and intent of the Fees Act. Since the Fees Act defines fees as "costs," most courts have held that fee applications are governed by Rule 54(d) not by Rule 59(e). And since this Court has held that a fee application should be determined in an independent proceeding and is not a request for a modification of the original decree, a fee request cannot be governed by Rule 59(e).

The First Circuit's requirement of simultaneous negotiation of the fee issue and issues on the merits imposes severe ethical conflicts on class counsel, and is in direct conflict with decisions of the Third and Ninth Circuits.

The First Circuit's decision also is contrary to sound judicial policy and to the intent of the Fees Act because it discourages the settlement of cases on the merits, discourages settlement of fee awards, delays appeals on the merits, and increases the number of fee applications that will have to be filed during the course of litigation.

I. THE FIRST CIRCUIT'S DECISION, REQUIRING A FEE APPLICATION TO BE FILED AFTER ENTRY OF A JUDGMENT ON THE MERITS NO LATER THAN WITHIN THE 10 DAYS ALLOWED BY RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR MOTIONS TO ALTER OR AMEND JUDGMENTS, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND WITH THE DECISIONS OF ALL OTHER COURTS OF APPEALS THAT HAVE ADDRESSED THIS ISSUE

The First Circuit's decision in the instant case, applying the 10-day period in Rule 59(e) to a fee request filed under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988 as amended, is in direct conflict with the decisions of this Court and with the decisions of the courts of appeals.

Most courts of appeals, recognizing that the Fees Act characterizes fees "as part of the costs," see generally Hutto v. Finney, 437 U.S. 678 (1978), have held that fee applications are subject only to Rule 54(d) and are unaffected by the 10-day limit of Rule 59(e). Other courts, adhering to this Court's decision in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), have held that a fee application presents a collateral and independent claim not a request for modification of a substantive decree on the merits, meaning that a fee application a fortiori is unaffected by Rule 59(e). In the instant case, the First Circuit rejected both of these approaches and instead applied Rule 59(e) to a fee request filed under the Fees Act. The First Circuit is the only court of appeals that has reached this result under the Fees Act.

A. SINCE FEE AWARDS UNDER THE CIVIL RIGHTS ATTORNEYS' FEES ACT ARE TREATED AS PART OF THE "COSTS," FEE APPLICATIONS ARE NOT GOVERNED BY RULE 59(e)

The Fees Act unmistakably states that fees are to be awarded "as part of the costs." 42 U.S.C. §1988, as amended. In Hutto v. Finney, 437 U.S. 679 (1978), where the Court held that this statutory authorization of fees as part of the costs was sufficient to abrogate the Eleventh Amendment immunity claimed by the state defendants, this Court repeatedly referred to the interrelationship between costs and fees noting that Congress of course could "amend its definition of taxable costs," that the Fees Act represented Congress' decision to authorize an award of attorney's fees as an item of costs," and that "there are a large number of statutory and common law situations in which allowable costs include counsel fees." 437 U.S. at 696-697 (footnotes omitted). If fees are to be

treated as part of the costs, as Congress intended them to be, an application for fees cannot be controlled by Rule 59(e).

Both the Fifth Circuit and the Seventh Circuit, relying on the express statutory language of the Fees Act and on this Court's decision in Hutto, have explicitly rejected the application of Rule 59(e) to a request for fees. See Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980), and Bond v. Stanton, Nos. 79-1759, 1799 & 1800 (7th Cir., Sept. 19, 1980), respectively. Another court of appeals, the Fourth Circuit, has declined to apply Rule 59(e) to a request for fees. Fox v. Parker, 626 F.2d 351 (4th Cir. 1980). Of all courts of appeals, only the First Circuit in this case has held Rule 59(e) applicable to a fee request under the Fees Act.[3]

The Fifth Circuit in Knighton fully explored the inapplicability of Rule 59(e) to a fee request under the Fees Act.

> "In this case, attorney's fees are by statute part of the costs. Because they may be awarded only to prevailing parties, and in the discretion of the district court guided by the Johnson factors, attorney's fees under section 1988 will ordinarily be sought only after litigation. Thus, a motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e). Cf. Fed. R. Civ. P. 58 ('[e]ntry of the judgment shall not be delayed for the taxing of costs')." 616 F.2d at 797 (citation omitted).

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3. There is one other court of appeals' decision where Rule 59(e) has been applied to a fee request, but there the request was not made under the Fees Act. Specifically, in Stacy v. Williams, 446 F.2d 1366 (5th Cir. 1971), the Fifth Circuit held that Rule 59(e) was applicable to a fee request made under the bad faith exception to the "American Rule." Stacy, however, was distinguished in Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980), where the Fifth Circuit rejected the application of Rule 59(e) to a fee request made under the Fees Act.

The Fifth Circuit thus concluded that "[b]ecause Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." 616 F.2d at 798.

Thereafter, the Seventh Circuit in Bond fully agreed with the Fifth Circuit's decision in Knighton, and thus explicitly rejected defendants' Rule 59(e) argument. Slip Opinion at 5.

Reaching a similar conclusion but in a different manner, the Fourth Circuit in Fox rejected defendant's Rule 59(e) argument on the grounds that the argument could not be raised for the first time on appeal.[4] 626 F.2d at 352-353.

Contrary to the express language of the Fees Act, contrary to this Court's decision in Hutto, and contrary to the courts of appeals' decisions in Knighton, Bond and Fox, the First Circuit here held that fees should not be treated as part of costs, and that a request for fees is better characterized as a motion to alter or amend a judgment which is governed by Rule 59(e). Sufficient to overcome the language of the Fees Act and controlling precedent, in the First Circuit's view, were three factual differences between fees and other items of costs: (1) in order to calculate an award of fees, a "district court must evaluate possibly a dozen diverse factors," (2) in awarding fees, "the district court is generally assisted by submissions from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter;" and (3) subsequent to an award of

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4. The Rule 59(e) argument in this case also was raised for the first time on appeal. Disagreeing with the later reasoning of the Fourth Circuit in Fox v. Parker, 626 F.2d 351 (4th Cir. 1980), the First Circuit here held that Rule 59(e) was jurisdictional and that the argument thus could be raised for the first time on appeal. A-4 & A-5.

fees, "[a]ppeals often ensue -- leading to the prospect of separate fee appeals." A-10, A-11.[5] These factual differences, however, do not provide legal grounds for reading Congress' chosen language that fees shall be awarded "as part of the costs" out of the Fees Act. Nor do they explain why, as a matter of law, a fee request should be governed by Rule 59(e).[6]

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5. The First Circuit also argued, A-9, A-10, that fees should not be treated as part of the costs because fees are awarded by courts whereas most costs "may be taxed by the clerk" under Rule 54(d). But aside from the fact that the word "may" in Rule 54(d) is discretionary not mandatory; aside from the fact that 28 U.S.C. §1920, which itemizes statutory costs, authorizes the allowance of costs by either a "judge or clerk;" and aside from the fact that one set of costs itemized in §1920, the compensation of interpreters and court-appointed experts, etc., is "peculiarly within the court's own authority," A-10; the fact of the matter is that Rule 54(d) and §1920 must be read in conjunction with Congress' chosen language in the Fees Act which authorizes "the court," not a clerk, to award "a reasonable attorney's fee as part of the costs," 42 U.S.C. §1988. As this Court has already pointed out, it was "Congress' decision to authorize an award of attorneys fees as an item of costs." Hutto v. Finney, 437 U.S. 678, 697 (1978).

6. The first two factual differences noted by the First Circuit -- the many factors to be considered in computing fees, and the availability of a hearing -- do not support the application of Rule 59(e), but do support the conclusion that a fee request presents a collateral and independent claim. See pp. 13 - 16, infra.

The third difference -- the possibility of separate appeals -- as well as the First Circuit's suggestion that it will "often be more economical of a court's time to resolve fees requests prior to entry of a final judgment," A-13 & A-14, similarly do not support the application of Rule 59(e) to a fee request. To the contrary, the First Circuit's rule is entirely uneconomical particularly in its effect on trial courts. First, as this Court recognized in Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974), in many civil rights cases "many final orders may issue in the course of the litigation." Under the First Circuit's rule, separate fee requests will now have to be filed after each of the many final orders. Second, the short 10-day period under Rule 59(e) substantially diminishes the possibility of post-judgment fee settlements since all fee requests in order to be timely will have to be filed with the courts immediately. Indeed, for the reasons discussed at pp. 23-25, infra., the First Circuit's rule will cause fewer cases to be settled on the merits and force more cases to trial.

The First Circuit's worry about piecemeal appeals is better answered by the approach adopted by the Seventh Circuit in Terket v. Lund, 623 F.2d 29 (7th Cir. 1980). There the Seventh Circuit held that "district courts in this circuit should proceed with attorneys' fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits." 623 F.2d at 34 (footnote omitted). In fact, under Rule 3(b) of the Federal Rules of Appellate Procedure, "[a]ppeals may be consolidated by order of the court of appeals upon its motion."

In sum, the First Circuit's decision is in conflict with the decisions of other courts of appeals, with this Court's decision in Hutto, and with the explicit language of the Fees Act, and also is erroneous as a matter of law.

B. SINCE FEE APPLICATIONS INVOLVE COLLATERAL AND INDEPENDENT PROCEEDINGS AND NOT A REQUEST FOR A MODIFICATION OF A JUDGMENT ON THE MERITS, FEE APPLICATIONS ARE NOT GOVERNED BY RULE 59(e)

In Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), this Court rejected a timeliness claim identical to that adopted by the First Circuit in this case. At issue in Sprague was the appropriateness of a fee award made pursuant to a fee application which had been filed several years after entry of a judgment on the merits of the case. In the defendant's view, the application was untimely under the then-applicable rules of equity which allowed a final decree to be amended only by a motion filed during the term of court of its entry. Rejecting this argument, and reversing the First Circuit, this Court squarely held that a fee application is not a request for modification of a substantive decree on the merits:

> "Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals--that it came after the end of the term at which the main decree was entered and therefore too late--falls." 307 U.S. at 170.

Although the Court reached this decision under the then-existing rules of equity, the decision would have been the same under Rule 59(e), for, as the Court noted, the timeliness rules pertaining to terms of court under the rules of equity had been replaced by similar timeliness require-

ments in Rules 59 and 60 of the new Federal Rules of Civil Procedure. 307 U.S. at 169 n. 9. Under either set of rules, as Justice Frankfurter concluded in his opinion for the Court, a fee application is not a motion to alter or amend a judgment for the simple reason that "'the inquiry [is] a collateral one, having a distinct and independent character.'" 307 U.S. at 169 (footnote and citation omitted).

The collateral and independent nature of a fee determination is vividly illustrated by the many factors and standards which must be considered separate and apart from the merits in determining an award of fees. As the legislative history of the Fees Act states:

> "The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F. R.D. 680 (N.D.Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D.Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975)." S.Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976).

Consistent with this legislative history, the lower courts routinely apply the twelve separate factors set forth in Johnson for determining fee awards through the "lodestar" method of fee computation, the method used in Stanford Daily and Davis.[7] This process is often "a matter of some

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7. The lodestar method of fee computation is regularly used by most district courts and has long been required by the Second and Third Circuits. See Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). More recently, the lodestar method has been formally adopted by the Fifth Circuit, Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980), and by the District of Columbia Circuit, Copeland v. Marshall, No. 77-1351 (D.C.Cir., Sept. 2, 1980) (en banc).

complexity" which ordinarily involves "the taking of evidence and briefing." Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974). See also Perkins v. Standard Oil Co. of Califronia, 399 U.S. 222, 223 (1970), holding that appellate fees should be awarded by trial courts "after hearing evidence as to the nature and extent of the services rendered."

In view of this Court's decision in Sprague and of the separate and distinct factors that must be considered in determining fee awards, many courts of appeals have characterized fee requests as collateral and independent claims. For example, in Terket v. Lund, 623 F.2d 29, 33-34 (7th Cir. 1980), the Seventh Circuit recognized that a fee determination requires "an examination of factors beyond the issues decided with the merits of the suit," and accordingly held that a fee determination "is not the sort of reconsideration of the merits which could lead to altering the substantive judgment. . . . The district court merely takes the merits into account, along with many other factors, in making a discretionary decision entirely distinct from the underlying judgment." See also Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980): "Claims for attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot."[8]

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8. In cases that become moot, judgments on the merits ordinarily are entered in favor of defendants and the cases are dismissed. But the form of an underlying final judgment against a plaintiff does not control an award of fees under the Fees Act. Instead, a plaintiff who suffers an adverse judgment is entitled to fees where the defendants' action in mooting the case provided some of the relief sought by the plaintiff. See, e.g., Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980); Robinson v. Kimbrough, 620 F.2d 468 (5th Cir. 1980); Oldham v. Ehrlich, 617 F.2d 163 (8th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 624 (6th Cir. 1979); Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979); International Society for Krishna Consciousness, Inc. v. Anderson, 569 F.2d 1027 (8th Cir. 1977); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C.Cir. 1977). In fact, plaintiffs can recover fees even if they voluntarily dismiss a case after defendants moot it by providing some of the relief requested. Williams v. Anderson, 620 F.2d 199 (8th Cir. 1980). In other words, a fee request is entirely separate and independent from the form and substance of an underlying judgment on the merits.

The collateral and independent nature of fee awards has been recognized most frequently in the context of their appealability. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1947); Trustees v. Greenough, 105 U.S. 527 (1882); see also the cases cited in Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131 (6th Cir. 1980). Their independent status has also been recognized in other contexts. For example, this Court held last Term that a fee-shifting statute alone can be sufficient to "authorize a federal-court action [solely] to recover an award of attorney's fees." New York Gaslight Club, Inc. v. Carey, 64 L.Ed.2d 723, 738 (1980).[9] In view of these decisions, there can be no doubt about the correctness of Justice Frankfurter's conclusion for the Court in Sprague v. Ticonic National Bank, 307 U.S. 161, 169, 170 (1939), that a fee application has "a distinct and independent character" and is "not a request for a modification of the original decree."

Contrary to this authority, the First Circuit rejected petitioner's argument that the fee request presented a collateral and independent claim, basing its decision on the grounds that the Fees Act authorizes fee awards not to counsel for the prevailing party, but to the "prevailing party," and on the grounds that counsel asserted not "a right of his own [but] one of his client." A-12. The First Circuit reached this conclusion despite the fact that petitioner was represented without fee by counsel for New Hampshire Legal Assistance, A-17, and despite the fact that the trial court had awarded the fees "to [petitioner's] counsel," A-25, (emphasis added).

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9. Although the Court's decision in New York Gaslight Club was based on the fee authorization in Title VII, the same result presumably would obtain under the Fees Act. As the Court there observed, the Fees Act "is legislation similar in purpose and design to Title VII's fee provision." 64 L.Ed.2d at 738 n.9.

Among the errors in the First Circuit's conclusion is the reality--illustrated by the facts here--that public interest lawyers, who often represent their clients without a fee, in fact are asserting their own rights or the rights of their supporting public interest organizations to an award of reasonable fees. Indeed, as the courts have recognized time and again, fee awards are not intended to provide windfalls to prevailing parties but instead are to be paid directly to the attorneys or their supporting organizations. See, e.g., Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970), where the Fifth Circuit directed "that the fees allowed are to reimburse and compensate for legal services rendered and will not go to the litigants, named or class." The fact that fee awards in public interest litigation are actually to be paid directly to the attorneys or their public interest organizations has also been repeatedly recognized by this Court;[10] it indeed has been recognized by the

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10. See generally, Maher v. Gagne, 65 L.Ed.2d 653, 659 (1980) where fees were awarded to "respondent's counsel," the Legal Aid Society of Hartford County; New York Gaslight Club, Inc. v. Carey, 64 L.Ed.2d 723, 738 n.9 (1980), where fees were held appropriate across-the-board for "public interest groups," including ofcourse the organization that supplied counsel in that case, the NAACP; Hutto v. Finney, 437 U.S. 678, 693 (1978), where appellate fees were ordered to be paid "to counsel for the prevailing parties."

First Circuit itself;[11] and it is fully supported by the legislative history of the Fees Act.[12]

In sum, not only is the First Circuit's decision in conflict with the decisions of other courts of appeals and with this Court's decision in Sprague, but the premise for the First Circuit's result is erroneous as a matter of law.

II. THE FIRST CIRCUIT'S DECISION, REQUIRING AWARDS OF ATTORNEYS' FEES TO BE NEGOTIATED CONCURRENTLY WITH THE NEGOTIATION OF A CONSENT DECREE RESOLVING THE MERITS OF A CLASS ACTION LAWSUIT, IMPOSES ETHICAL CONFLICTS ON CLASS COUNSEL AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

Because the First Circuit viewed an award of fees as a necessary part of a final judgment on the merits rather than as part of the costs to be determined in a collateral and independent proceeding, it held "that a fees award under 42 U.S.C. §1988 is a matter to be raised and determined prior to the entry of a final judgment." A-4. Since many final judgments are negotiated consent decrees, the First Circuit's decision requires fees to be negotiated concurrently with the

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11. In earlier decisions, the First Circuit consistently recognized that fee awards are to be paid directly to counsel or to their public interest organizations. See, e.g., Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980) (ACLU's National Prison Project); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978) (Rhode Island Legal Services); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978) (Puerto Rico Legal Services); Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978) (NAACP Legal Defense Fund).

12. In enacting the Fees Act, Congress was fully aware that fee awards would be paid to the lawyers themselves or to their supporting organizations. The Senate Report, for example, explicitly states that "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee paying client, 'for all time reasonably expended on a matter.'" S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976) (emphasis added) (citation omitted). In fact, the need for the Fees Act was premised on "evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 3 (1976). Designed to remedy this problem by providing a financial incentive to lawyers, the Fees Act was enacted to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." Id. at 9.

negotiation of a decree resolving the merits of a class action lawsuit. This obligation of simultaneous negotiation was made explicit by the First Circuit: not even "in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations." A-15 (emphasis added).

What the First Circuit was unable to see as wrong are the very real ethical conflicts that such a rule imposes upon counsel, especially class counsel.[13] These conflicts, not perceived by the First Circuit, were admitted voluntarily and at length by respondents' counsel -- defense counsel -- in two hearings when this case was before the trial court. See n.2, supra. They also were aptly described in Regalado v. Johnson, 79 F.R.D. 447 (N.D.Ill. 1978):

> "Everyone familiar with civil rights litigation knows that a plaintiff in such suits rarely pays attorney's fees or the costs of litigation. For these reasons, a motion for fees and costs in such a case, although made in the name of the plaintiff, is really one by the attorney. This interest in the fee makes it improper for the lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions." 79 F.R.D. at 451.

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13. The First Circuit's rule imposes ethical conflicts on both nonclass counsel and class counsel. The conflict imposed on class counsel is greater, for even without regard to fees, defense counsel sometimes offer full relief to the parties in exchange for no relief for the class. This case, as noted earlier, was certified as a class action. A-2.

In view of these conflicts, two courts of appeals, the Third and Ninth Circuits, have now adopted rules strongly discouraging the simultaneous negotiation of a substantive judgment on the merits and of the availability or amount of fees. The Third Circuit's view is set forth in Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977), where the court urged avoidance of such ethical conflicts by directing "trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees." The Ninth Circuit, in Mendoza v. United States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980), agreed, initially observing that the conflicts do not disappear where "there is no fund or money damages being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict between class counsel and members of the class remains." As the Ninth Circuit concluded, "we strongly discourage the simultaneous negotiation of attorneys fees and substantive issues in class action settlement negotiations." 623 F.2d at 1353.

The First Circuit's contrary decision here, it needs to be emphasized, does not simply allow simultaneous negotiation. It requires simultaneous negotiation, and thereby imposes on class counsel unconscionable ethical conflicts -- conflicts that are admitted on the record in this case. See n.2, supra.

By requiring simultaneous negotiation, the First Circuit's decision not only is diametrically opposed to the Third Circuit's decision in Prandini and the Ninth Circuit's

decision in Mendoza, but also is inconsistent with prior decisions of this Court holding that fee issues are properly addressed by the parties and by the courts separate from and subsequent to any consideration of the merits. Last Term, for example, in Maher v. Gagne, 65 L.Ed.2d 653 (1980), this Court upheld a fee award which had been entered under the Fees Act subsequent to a negotiated settlement on the merits of the case. Relying on the legislative history of the Fees Act, this Court held:

> "The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of §1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' S. Rep. No. 94-1011, p.5 (1976)." 65 L.Ed.2d at 661.[14]

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14. In addition to the Senate Report -- relied on by the Court in Maher -- the House Report accompanying the Fees Act also intended that fee awards be addressed after a negotiated resolution of the merits:

> "The phrase 'prevailing party' is not intended to be limited to the victor after entry of a final judgment following a full trial on the merits.... If the litigation terminates by consent decree, or example, it would be proper to award counsel fees. Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974) [aff'g 376 F.Supp. 483 (N.D.Ohio 1973)]; Parker v. Matthews, 411 F.Supp. 1059 (D.D.C. 1976) [aff'd sub nom., Parker v. Califano, 561 F.2d 320 (D.C.Cir. 1977)]; Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975). A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976).

[footnote continued on next page]

This same procedure of addressing fees separate from and only after consideration of the merits has also been held to be the recommended course for trial courts. In Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), where the Court initially noted that "the resolution of the fee issue may be a matter of some complexity and require, as here, the taking of evidence and briefing," this Court held that it would have been wrong for the trial court to have "delay[ed] the implementation of a desegregation plan in order to resolve the question of fees simultaneously. The District Court properly chose not to address itself to the question of the award until after it had approved the non-interim plan for achievement of the unitary school system." 416 U.S. at 723.

The First Circuit's decision here, which treats fees as a necessary ingredient of a final order and which requires simultaneous negotiation of issues on the merits and of fee awards, imposes severe ethical conflicts on all counsel, expecially class counsel. The decision is inconsistent with the decisions of this Court and with the intent of Congress, and is in direct conflict with the decisions of the Third and Ninth Circuits.

[footnote continued from previous page]

The consent decrees in two of the cases relied on in the House Report, similar to the consent decree here, addressed and resolved the merits of the litigation without any reference to attorneys fees. Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974), aff'g 376 F.Supp. 483 (N.D.Ohio 1973); ASPIRA of New York, Inc. v. Board of Education of the City of New York,65 F.R.D. 541 (S.D.N.Y. 1975). The consent decree in the third case reserved the fee issue for later resolution by the court. Parker v. Califano, 411 F. Supp. 1059 (D.D.C. 1976).

III. THE FIRST CIRCUIT'S DECISION IS CONTRARY TO SOUND JUDICIAL POLICY AND CONTRARY TO THE LEGISLATIVE INTENT OF THE CIVIL RIGHTS ATTORNEYS FEES AWARDS ACT BECAUSE THE DECISION DISCOURAGES SETTLEMENT OF CASES ON THE MERITS, DISCOURAGES SETTLEMENT OF FEE AWARDS, DELAYS APPEALS ON THE MERITS, AND INCREASES THE NUMBER OF FEE APPLICATIONS THAT WILL HAVE TO BE FILED

The First Circuit's decision virtually assures fewer settlements and increased docket congestion. Rather than being settled on the merits, cases will be forced to trial and decision. And rather than allowing time for fee settlements after the entry of judgment, the First Circuit's decision requires fee applications to be filed immediately for resolution by the courts.

The impact of the First Circuit's decision on substantive negotiations is a real one. "Negotiation," as the Ninth Circuit has pointed out, "is necessarily a give and take process, and all active elements are weighted in the balance." Mendoza v. United States, 623 F.2d 1338, 1352 (9th Cir. 1980). Accordingly, with fees required to be negotiated at the same time as the merits of a case, class counsel often will be asked by their adversaries to accept less for their clients or less for themselves. Acceptance of the former is unethical.[15] Acceptance of the latter is

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15. The mere possibility of a sweetheart settlement -- "[w]e cannot indiscriminately assume, without more, that the amount of fees have [sic] no influence on the ultimate settlement obtained for the class when, along with the substantive remedy issues, it is an active element of negotiation" -- led the Ninth Circuit to conclude, as noted earlier, that it "would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place." Mendoza v. United States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980).

both unrealistic and contrary to the express purposes of the Fees Act.[16] The obvious result is that cases which could be settled will instead go to trial.

The First Circuit's decision also removes from the negotiation tables most post-judgment fee requests. Because of the First Circuit's application of Rule 59(e) to post-judgment fee requests, counsel for the prevailing parties will have to prepare and file within 10 days: a fee application, time records and affidavits in support thereof, affidavits addressing counsel's hourly rates as well as the various contingency factors and quality factors relevant to fee computation, and a supporting brief.[17] No time can be lost

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16. The First Circuit's suggestion that class counsel can always assist settlement if they "decide to waive fees altogether," A-15, is directly contrary to Congress' intent in enacting the Fees Act. Not only did Congress state that it was "proper to award counsel fees" where the substantive litigation "terminates by consent decree," and that counsel "should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion," H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976), but the express purpose of the Act is to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." Id. at 9. Without the prospect of reasonable fee awards, lawyers will decline to represent those whose rights have been violated. This would then reflect the situation that Congress described at the time it enacted the Fees Act:

> "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." Id. at 1.

By inviting class counsel to waive their fees, by encouraging their adversaries to negotiate a fee waiver in return for relief for the class, and indeed simply by requiring simultaneous negotiation of fees and the merits, the First Circuit has negated the very purpose of the Fees Act.

17. The First Circuit requires extensive documentation in support of a fee application. See Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977); King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978). These requirements cannot be taken lightly, for the burden is on the movant lawyers to prove entitlement to a fee award. Id.; see also, Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978).

attempting to negotiate a settlement concerning the availability or amount of fees. Instead, all fee requests within the jurisdiction of the First Circuit must be filed with the courts. And once the applications have been submitted, with the positions of the parties having hardened, most applications of necessity will have to be resolved by the courts.

In addition to its effect of discouraging settlements, the First Circuit's decision will play havoc with appellate procedures as well as actually increase the number of fee applications that will be filed. Since there now can be no final orders issued by trial courts in the First Circuit until fee awards are resolved, both injunctive relief and appeals on the merits will often be delayed. The former is contrary to this Court's decision in Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974), which held that it would be "undesirable to delay" the implementation of injunctive relief "in order to resolve the question of fees simultaneously." The latter is contrary to the allowance and resolution of appeals on the merits -- which sometimes result in a reversal on the merits -- before fee applications are even filed. See generally Perkins v. Standard Oil Co. of California, 399 U.S. 222 (1970); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). Moreover, since "many final orders may issue in the course of the litigation," Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974), parties who prevail in the First Circuit's trial courts will have to file separate fee applications within 10 days of every such final order rather than await the conclusion of the entire litigation.

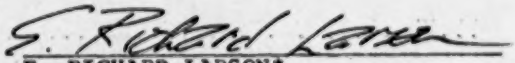
In short, the First Circuit's decision in this case runs contrary to the dictates of sound judicial policy. It also is erroneous as a matter of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the decision of the First Circuit should be summarily reversed. Alternatively, the petition should be granted, and the case set for plenary review.

Dated: New York, New York
December 10, 1980

Respectively submitted,



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United States Court of Appeals
For the First Circuit

No. 79-1536

RICHARD H. WHITE,

PLAINTIFF, APPELLEE,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Michael M. Black, with whom *Edward F. Smith* was on brief, for appellant.

Raymond J. Kelly, with whom *Alan Cronheim* was on brief, for appellees.

August 12, 1980

CAMPBELL, *Circuit Judge*. New Hampshire Department of Employment Security (NHDES) appeals from the district court's allowance of plaintiff's post-judgment request for attorney's fees and the court's denial of NHDES' subsequent motion to vacate a previously entered consent decree. As we find the fees request to have been filed too late, we reverse the award.

On March 8, 1976 the plaintiff, Richard M. White, commenced a class action in the United States District Court for the District of New Hampshire challenging NHDES' unemployment compensation procedures. White alleged that delays in the administration of New Hampshire's unemployment compensation program affecting certain groups of

APPENDIX "A"

applicants worked a denial of due process and as well were violative of the so-called "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).[1] The complaint alleged jurisdiction under 28 U.S.C. §§ 1343(3), (4) and 42 U.S.C. § 1983; requested class certification under Fed. R. Civ. P. 23; and sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202 and Fed. R. Civ. P. 57. The complaint did not include any request for attorney's fees.

Class certification was obtained on May 11, 1976, with the case proceeding to trial on October 12, 1977. The district court found that NHDES' scheme of administration did indeed violate the "when due" provision of the Social Security Act; the court ordered relief and judgment was entered November 15, 1977. Neither the court's opinion and order nor the judgment made any reference to a possible award of attorney's fees. The judgment was subsequently amended in respects not pertinent to the present appeal, and NHDES, on December 27, 1977, filed a timely notice of appeal.

While its appeal was pending in this court, NHDES requested and received numerous extensions of time for the filing of briefs and designation of an appendix on the ground that the parties were attempting to negotiate a settlement. Finally, on December 11, 1978, upon motion of NHDES, this court ordered the "cause...remanded to the district court for the purpose of entertaining a consent decree." The consent decree was approved by the district court on January 26, 1979, with judgment entered on that day. Neither the consent decree nor the judgment contained mention of attorney's fees. The district court returned, after request, the appeal bond on February 28, 1979; the various exhibits apparently also were returned on or near that date.

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[1] The complaint also raised a pendent state claim alleging violations of R.S.A. 282:5-B(2)(d) which regulates certain aspects of New Hampshire unemployment compensation eligibility determination procedures.

On June 7, 1979, some four and one-half months after the district court's approval of the consent decree and its entry of judgment, plaintiffs moved for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. NHDES objected to this motion contending: 1) that plaintiffs had, during the "original discussions...concerning settlement," indicated that attorney's fees would be waived;[1] 2) that plaintiffs had waited "too long to request attorney's fees...;" 3) that an award of fees would be counterproductive as it would penalize the state despite its good faith settlement efforts; and 4) that plaintiffs were not, under the terms of the consent decree, truly the "prevailing party."

A hearing on the fee request was held, and on August 30, 1979 the district court entered an order granting a fee award in an amount in excess of $16,000. Shortly thereafter, on September 13, 1979, NHDES, over ojection, moved to vacate the consent decree contending that "Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent Decree caught [NHDES] by surprise, as prior to this time, [NHDES] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." The district court, after hearing, in a terse order of October 1, 1979, denied the motion to vacate. NHDES had previously filed on September 28, 1979 a notice of appeal of the district court's award of fees, and on October 30, 1979 it filed a similar

[1] In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. Plaintiffs contended that they had expected the fees issue to be resolved through negotiation following the entry of judgment while NHDES basically represented that it had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree "proved nugatory."

notice concerning the court's adverse ruling on its motion to vacate. The appeals were consolidated by this court's order of November 6, 1979.

I.

We dispose of this appeal focusing solely on the question of the timeliness of plaintiff's motion for fees. As we set aside the award because the request was untimely, we do not consider NHDES' alternative contention that, in light of the unexpected award, it should be allowed to withdraw its consent and that the judgment entered pursuant to such consent should therefore be vacated. We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e); such a motion must, however, be served within 10 days after entry of judgment.[3] Since the present fees request was filed long after expiration of the 10 day period, and since Fed. R. Civ. P. 6(b) prohibits a court from extending the 10 day period, the lower court was without authority to entertain plaintiff's fees request.

Before proceeding to amplify these views we briefly consider plaintiff's threshold argument that since NHDES did not specifically raise the Rule 59(e) argument in the lower court, it is precluded from doing so now. *See Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). The short answer to this objection is that Rule 6(b)'s proscription against the enlargement of the time for serving motions under Rule 59(e) is "mandatory and jurisdictional." *Lapiczak* v. *Zaist*, 451 F.2d

[3] Rule 59(e) provides in its entirety
"Motion to Alter or Amend a Judgment. A Motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

79, 80 (2d Cir. 1971); *see United States* v. *Robinson*, 361 U.S. 220, 229 (1960). Since we hold that a section 1988 fees motion must be made in time to be incorporated in the final judgment, the 10 day period prescribed by Rule 59(e) was in these circumstances the movant's last shot at achieving this result. The district court was thus without jurisdiction over the later application, and the matter of that lack of jurisdiction properly may be first raised at any stage of the proceedings, including the present appeal. *See, e.g.*, Fed. R. Civ. P. 12(b)(3).

II.

Coming to the merits of the timeliness question, our view of the procedural rules applicable to a section 1988 fees request is essentially that set out by Judge Warriner of the Eastern District of Virginia in a comprehensive opinion in *Hirschkop* v. *Snead*, 475 F. Supp. 59 (E.D. Va. 1979). Judge Warriner concluded that "the weight of authority favors the proposition that a motion for attorney's fees under § 1988 must be made within 10 days of entry of final judgment under Rule 59(e)." 475 F. Supp. at 62. The court, in the course of concluding that a final judgment had in fact been entered, rejected the argument that section 1988 fees should be treated as an item of costs governed by Fed. R. Civ. P. 54 and 58, which permit the taxing of costs, without express limit of time, after entry of judgment. The court also rejected the alternative argument that section 1988 fees were somehow so "collateral" to the main litigation as to be eligible for treatment in isolation from the judgment therein.

When the present fees award was appealed, no circuit court had yet spoken on the timeliness issue considered in *Hirschkop*, although there existed a fair amount of circuit and district court authority on the timeliness of motions for attorney's fees made in contexts other than section 1988.[4] Most, though not

[4] *E.g.*, *Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978) (in action for disability pension benefits, Fed. R. Civ. P. 59(e)'s ten-day time limitation bars successful plaintiff's request for attorney's fees filed more than 30 days after the entry of

all, of this authority pointed in the direction taken by the district court in *Hirschkop*. The first decision by a circuit court discussing the timeliness of a section 1988 fee request was handed down soon after appellate argument in the present case; this was the Fifth Circuit's decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), holding, contrary to *Hirschkop*, that attorney's fees under section 1988 were "costs" within Fed. R. Civ. P. 54(b) and 58. As Rule 58 specifically provides that "Entry of judgment shall not be delayed for the taxing of costs," and neither Rule 54(b) nor 58 purports to prescribe any period after judgment within which costs ap-

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judgment) (aff'd on other grounds, although timeliness issue discussed without resolution, 589 F.2d 112 (2d Cir. 1978); *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970) (Rule 59(e)'s ten-day limitation bars request for attorney's fees filed more than two months after entry of final judgment; court concluded that it was bound to apply Rule 59 as the fee request concerned "the granting of new substantive relief") (aff'd on the basis of Rule 59(e), 446 F.2d 1366 (5th Cir. 1971)); *DuBuit* v. *Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) (in patent case, "issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment...and not left open pending the outcome of the appeal."); *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979) (in action under Endangered Species Act, request for attorney's fees filed some 28 months after the entry of court's "final order" was barred by Rule 59(e)'s ten-day limitation or alternatively by Rule 60(b)'s one-year limitation on motions for relief from judgment); *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951) (interpreting statute governing award of attorney's fees in patent infringement case to mean "that if an award...is to be made...the [trial] judge should do so either at the time of the entry of judgment or specifically reserve jurisdiction in such judgment to do so. ..."). *Compare Lichtenstein* v. *Lichtenstein*, 53 F.R.D. 533 (E.D. Pa. 1972) (although acknowledging that Rule 59(e) would bar a motion to amend the judgment to include attorney's fees filed after the Rule's ten-day period had expired, the court instead termed plaintiff's request as one to amend the Bill of Costs and allowed it despite timeliness objection) (rev'd on other grounds, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974)). *See also* the so-called common fund cases discussed *infra*.

plications must be filed, the Fifth Circuit, in the absence of any contrary local rule,[5] found no bar to entertaining a fees request filed some two months after the entry of final judgment. Were we to follow the decision in *Knighton*, the present fees request and award would thus likely be timely even though filed some months after entry of final judgment. With all respect, however, we disagree with *Knighton*.

We start from the premise that a final judgment ordinarily signifies the final resolution, subject to appeal, of all claims raised in a lawsuit. *See* Fed. R. Civ. P. 54. New claims may thereafter be advanced and old ones reinstated only pursuant to rules providing, within narrowly defined circumstances, for the reopening of the judgment. *See, e.g.*, Fed. R. Civ. P. 59, 60. If this were not so, appellate tribunals would be constantly vexed by multiple appeals growing out of fragments of the same litigation, and a party could never be sure when his case had ended.[6] It follows that a prevailing party's claim for at-

[5] Although there is no local rule in the District of New Hampshire providing that motions for costs be filed within some specified time after entry of judgment, a number of district courts have adopted such rules. 10 Wright & Miller, Federal Practice and Procedure § 2679 at 240 n.76.

[6] Blackstone adds a bit of historical perspective to the practical considerations underlying the well-settled concept of finality of judgments. He tells how Edward I, "on his return from his French dominions in the seventeenth year of his reign" found it "necessary (or convenient, in order to replenish his exchequer)" to fine rather heavily various judges for "their corruption and other malpractices...." Paramount among these bad habits was the practice of "erasing and altering records," a practice apparently engaged in by "almost all of the king's justices, even the most able and upright." And these punishments were often of a sizeable amount. Sir Ralph Hengham, Chief Justice of the King's Bench is said to have been fined some 7,000 marks, a rather tidy sum considering that the Chief's annual salary was then only 60 marks. The threat of such punishment was clearly not lost on the bench, for as Blackstone relates: "The severity of which proceedings seems to have alarmed the succeeding judges, that through a fear of being said to do wrong,

torney's fees under section 1988 must be resolved before or in the final judgment unless that claim be regarded as falling within some special exception carved out by rule or practice.

Plaintiff urges two such exceptions upon us in support of the view that their failure to request fees prior to the entry of judgment or to move within 10 days to amend such judgment so as to include a fee award, is not fatal to their subsequent fee application. First plaintiff argues, as the Fifth Circuit held in *Knighton*, that section 1988 fees are properly treated as "costs," and thus specifically exempted from the requirement of resolution prior to the entry of final judgment.[7] This position is not without some support in the language of the Fees Act. The Act grants to the district court, in various specified actions, the discretion to "allow the prevailing party, other

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they hesitated at doing what was right. As it was hazardous to alter a record duly made up, even from compassionate motives...they resolved not to touch a record any more: but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. ..." 3 Blackstone Commentaries, 409-410.

Thus from Edward's rather severe attempt to fill his coffers and the already traditional view of the solemnity of all judgments "came the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." *La Vale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). Today, rules such as Fed. R. Civ. P. 54, 59 and 60 ease the situation somewhat, but the difficulties that would ensue were individual cases not to be organized around the principle of single and final judgment keep such escape valves the exception, not the rule.

[7] Notwithstanding plaintiff's reliance on the concept that attorney's fees are taxable as Rule 54 costs, plaintiff's motion for an award of attorney's fees was not made as part of a general application for costs; apparently, in fact, no such request for costs has yet been filed by plaintiff.

than the United States, a reasonable attorney's fee *as part of the costs*." 42 U.S.C. § 1988 (emphasis added). Focusing upon this language, the Fifth Circuit concluded in *Knighton* that, "Because Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980) (footnote omitted). We are unpersuaded, however, by this analysis.[8]

We do not find it clear that Congress, by generally describing attorney's fees under section 1988 as a part of the costs, meant thereby to include those fees within the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54. Rule 54(d), referring to the awarding of costs, provides, in part, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs... Costs may be taxed by the clerk on one day's notice." 28 U.S.C. § 1920 adds a bit of flesh to the bones of Rule 54(d) by providing:

> "A judge or clerk of any court of the United States may tax as costs the following:

[8] Apart from the argument based on "costs," *see, infra*, the Fifth Circuit in *Knighton* pointed to little in support of its conclusion that motions for section 1988 fees may be filed after judgment has been entered and the 10 day period for amending or altering such judgment has expired. *See* Fed. R. Civ. P. 59(e). To say, as did that court, that a motion for fees does not change the judgment but merely seeks what is due because of the judgmmnt is to beg the question to be decided. Nor are the cases cited by the Fifth Circuit in *Knighton* compelling. *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991, 994-95 n.3 (D.D.C. 1974), discussed the timeliness of a request for fees in the context of the so-called common fund situation, a situation which has long been distinguished from cases like the present. *See infra*. And, *Environmental Defense Fund, Inc.* v. *Froehlke*, 368 F. Supp. 231, 251-55 (W.D. Mo. 1973), while providing thorough background information on the history of and procedure for the awarding of costs, did not discuss the question of attorney's fees generally, let alone the specific question of the timeliness of a request for such.

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Examination of the above language strongly indicates that the costs allowed as of course by Rule 54(d) and detailed in 28 U.S.C. § 1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as capable of being taxed by the clerk on one day's notice. In keeping with this idea the costs listed in section 1920 are almost all capable of routine computation, and the one arguable exception, item (6), is peculiarly within the court's own authority to establish, without input from the parties and with little likelihood of engendering controversy. Not so the discretionary award of attorney's fees under section 1988. To calculate such an award, indeed, even to determine whether one should be made at all, the district court must evaluate possibly a dozen diverse factors, *see King v. Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), including such factors as the novelty and difficulty of the legal questions presented and the skill required to perform the particular services provided. Moreover, in determining the propriety and size of a fee award, the district court is generally assisted by submissions

from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter. Appeals often ensue—leading to the prospect of separate fees appeals if final judgment rules are disregarded—as the sizeable sums involved may impose a very substantial and bitterly disputed liability upon the losing party. Hence while such fees, like routine costs, are, to be sure, somewhat ancillary to the main dispute, they are fully capable of engendering a major controverted claim which will be closely intertwined with the merits of the primary dispute and which will require careful factual and legal analysis by the court. The considerations making it feasible to treat routine costs as an exception to final judgment rules—the ease of their computation and the fact that they almost never give rise to dispute or appeal—plainly do not apply to section 1988 attorney's fees. Thus we do not believe that a section 1988 fees award can be likened to the costs assessed routinely after entry of judgment. The potential amount of the fees award, the varied factors which must be considered by the court in reaching the fees decision, and the crucial role of the judge and parties in reaching that final determination render the fees/costs comparison strained at best.

True, as plaintiff points out, the Supreme Court itself, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), citing the language of the Fees Act, characterized attorney's fees under section 1988 as being a part of "costs." But this statement was made in the context of rejecting the contention that the eleventh amendment stood as a bar to the awarding of fees against a state. The Court's general reasoning and ultimate conclusion that "Costs have traditionally been awarded without regard for the state's Eleventh Amendment immunity," *id.* at 695, hardly seems dispositive of the question whether section 1988 attorney's fees fall within the specific types of taxable costs contemplated by Fed. R. Civ. P. 54(d) and 58. *Cf. Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980) (costs that federal courts may impose on lawyers who unreasonably and vexatiously extend court proceedings do not include attorneys' fees under section 1988).

Plaintiff advances a second and alternative argument in support of his position that the resolution of a section 1988 fee request should be treated differently from the general run of controverted issues resolved within the contours of a court's final judgment. He suggests that his "claim for attorney's fees is a collateral and independent claim," and thus not controlled by the time limits which relate solely to the entry of judgment in the central but supposedly separate claim on the merits. Plaintiff would have us view the fee matter as a separate mini-lawsuit to be commenced, argued and resolved at some point in time following the entry of judgment in the central litigation. While plaintiff argues that this position finds support in the cases, the cited decisions involved circumstances of a different sort than those presented here. As discussed by Judge Friendly in *Fase* v. *Seafarers Welfare & Pension Plan*, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978), "cases where attorneys seek, long after judgment, to be paid out of a fund created by the judgment, *Trustees* v. *Greenough*, 105 U.S. 527 (1882), *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), or earmarked assets whose distribution would be governed by the legal principle which plaintiff's attorney had established, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939)...present a lesser problem than those where allowance of a fee will result in an addition to the amount awarded by judgment. Something may also turn on whether...the lawyer is asserting a right of his own...; in the latter type of case it is easier to characterize the proceeding as 'collateral' or 'independent.' " Here we have neither the so-called common fund situation, *see also National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds*, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977), nor an attorney seeking fees by asserting a right of his own rather than one of his client. *See* 42 U.S.C. § 1988 (award of attorney's fees goes to "prevailing party," rather than attorney). *But cf. Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (8th Cir. 1980).

Moreover, plaintiff's contention that a section 1988 fee request is an independent claim that can be maintained after judgment runs squarely counter to the language of the Fees Act itself, which provides that "*In any action or proceeding* to enforce [appropriate civil rights statutes]" the court may, in its discretion, allow reasonable attorney's fees to the prevailing party. (Emphasis added). This language strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action.

We thus remain unpersuaded that a section 1988 fees request falls within some recognized exception—be it "costs" or a theory of independent claim—to the general rule requiring the resolution of controverted issues by a trial judge within the overall framework of the central litigation and the final judgment entered therein. Rather, our review of the relevant authority, *see, e.g.*, note 4, *supra*, including the Fees Act and the well-reasoned *Hirschkop* decision previously discussed, persuades us that the timeliness of a post-judgment motion for attorney's fees made pursuant to section 1988 is properly governed by Rule 59(e)'s ten day limitation.* A request for a discretionary award of fees under section 1988 is intimately tied to the questions raised in, and overall merits of, the prevailing party's case, *see King* v. *Greenblatt*, 560 F.2d at 1026-27; it is a request, moreover, that may lead to a sizeable and unpredictable addition to the burdens shouldered by the losing party, *see, e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir. 1980) (affirming fee award of $115,483.75); *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979) (award well in excess of $200,000). The ultimate award of fees is, in our view, clearly a part of the overall relief sought and granted during the course of a particular civil rights action. Not only will it often be more economical of a court's time to resolve fees requests prior to

*We need not now address the question whether and in what circumstances the time limits established in other Rules permitting the opening of judgments might apply to a section 1988 fees request.

entry of judgment rather than having them surface for the first time weeks or even months thereafter, but so doing ensures certainty as to the scope and finality of the judgment, *see Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363, 367 (E.D.N.Y. 1978), and at the same time reflects and re-enforces the strong policy against piecemeal appeals. *Wright* v. *Jackson*, 522 F.2d 935, 937 (4th Cir. 1975) (Aldrich, J.).

Indeed, the present case highlights many of the problems which would likely be frequently encountered were we not to endorse the position that Rule 59(e)'s ten day limitation marks, in terms of time, the outer limits of a fees request. The protraction here of a dispute previously, to all appearances, resolved is clearly not an occurrence to be encouraged. A court, having set its hand to the plow on the central litigation, should complete the furrow all at one time. The present post-judgment motion for an award, coming as it did nearly five months after judgment, was in our view too late.

We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, *see, e.g.*, *Ben David* v. *Travisono*, No. 79-1186, slip op. at 6 n.2 (1st Cir. May 16, 1980); the state of the law has surely been such as to suggest the wisdom of that course.

Our decision will not prevent a district court from granting prompt and effective relief in a civil rights case. Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, *see Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980), but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the

means to ensure, when necessary, the appealability of such a judgment. Under Fed. R. Civ. P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibilty. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case.

Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations. *Cf. Regalado* v. *Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978) (expressing concern over the propriety of injecting the issue of fees into settlement negotiations). Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court; further, they may, of course, decide to waive fees altogether. But there is nothing whatever to be encouraged in the path followed here—leaving the matter of fees unmentioned in the settlement and then raising it unilaterally several months later under circumstances that cast a shadow upon the settlement itself. Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist.

As plaintiff's fees claim was filed out of time, it should not have been entertained, and we hold the district court was without jurisdiction to make any award.

The fees award entered by the district court is vacated.

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THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Richard H. White, Et Al.

v. #C76-71

The State of New Hampshire
Department of Employment Security
Benjamin C. Adams, Commissioner

ORDER ON MOTION TO VACATE CONSENT DECREE

Motion denied.

So Ordered,

October 1, 1979

Martin F. Loughlin
U.S. District Judge

CC Michael M. Black, Esq.

Raymond J. Kelly, Esq.

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

RECEIVED
AUG 31 1979
NEW HAMPSHIRE
LEGAL ASSISTANCE
PUBLIC DEFENDERS

Richard H. White, et al.

v. EC 76-71

N.H. Department of
Employment Security, et al.

COURT's RULING ON MOTION FOR ATTORNEYS' FEES

This motion is brought under 42 U.S.C. §1988. The section provides that.

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the costs.

This case has a long history and the Court will not rehash in total the factual or chronological litany of events.

Briefly, the Attorneys for New Hampshire Legal Assistance saw the original plaintiff, Mr. White in 1975. Suit was initiated on his behalf in March, 1976. The case was heard before Judge Bownes and entailed a trial of two days. Subsequently, the case was appealed to the First Circuit. The delay in the appeal was due to the transcript not being ready for a period of six months. Upon checking the file, it is readily ascertainable that it is quite voluminous. There are over one hundred fifty entries.

There was a great amount of discovery in this case and William Barry, Magistrate was present at many discovery proceedings and he attempted to have counsel cooperate in facilitating and expediting this case through discovery procedures.

Counsel for the plaintiffs had to check Superior Court records in all ten counties in order to prepare their case as it was the defendant's position that files were privileged and could not be disclosed to plaintiff's counsel. As an aside, there is an average of three hundred appeals from determinations of the defendant's department to the New Hampshire Superior Court.

The parties attempted to arrive at a Consent Decree and there was evidence at the outset that attorney's fees and costs would be waived. These attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved by Judge Devine on January 26, 1979.

At a hearing on August 21, 1979, defendant's counsel agreed that the time spent by plaintiff's counsel was accurate, but could not and did not agree as to the amount of legal fees requested in the sum of $18,554. Cross reference is made to itemized bill in interest of plaintiff's motion for attorneys' fees filed August 14, 1979, docket marking of 155.

Of this sum of money, Attorney Raymond J. Kelly is seeking to recover $15,303.25 and Attorney Alan J. Cronheim $3,250.75 reaching the heretofore mentioned total of $18,544.00.

Reference is also made to a memorandum dated June 20, 1979 from Chief Judge Frank Coffin. While this memorandum involves fee requests under 18 U.S.C. §30006A, it does state that the reasonableness of Attorneys' fees are to be decided by the District Court Judge. The reason the Court refers to this memo is that this particular Judge did not hear the case on its merits and is doing as well as he can by reviewing the file.

Reference is made to the case of Torres v. Sachs, 538 F. 2d 10 at page 13. Here the principal was stated that.

> allowable fees and expenses may not be reduced because (the prevailing party's) was employed . . . . by a civil rights organization . . . . or because the Attorney does not exact a fee.

Reference is also made to the case of Hoitt v. Vitek 495 F. 2d 219. This is a case from the First Circuit involving a suit against the Warden of the New Hampshire State Prison in violation of 42 U.S.Code §1983. The District Judge, Bownes, J. allowed fees to a private attorney, but denied fees to the New Hampshire Legal Assistance attorneys. At Page 221, there is strong dictum that if the plaintiffs had been represented solely by New Hampshire Legal Assistance, then their legal fees should have been granted. Quoting from said opinion at

> If the sole representative of the plaintiffs below had been NHLA and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys' fees to NHLA. See generally Note, Awards of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973).

Another issue raised by the defendants is that the Consent Decree does not make them "Prevailing Parties". In general parties may be considered to have prevailed when they vindicate rights through a Consent Judgment or without formally obtaining relief. See Nadeau v. Helgemoe, 581 F. 2d 275.

Defendant's counsel has called to the Court's attention a leading first circuit case on attorneys fees. King v. Greenblatt 560 F. 2d, 1024. This case involved an appeal from the award in attorney's fees resulting from a successful civil rights suit to improve conditions of plaintiff's confinement at a treatment center for the sexually dangerous, 42 U.S.C.A. S1988.

Quoting from pages 1026, 1027 and 1028 the Court set forth the criteria to be used.

What constitutes a reasonable attorney's fee in a particular case shall rest within the sound discretion of the district court, see Johnson v. Georgia Highway Express, Inc. 488 F.2d 714, 717 (5th Cir. 1974). We shall, however, expect a court to adhere carefully to certain general criteria in making a discretionary award under the Fees Act.

The Fifth Circuit's decision in Johnson v. Georgia Highway Express, Inc, supra, was cited with approval in the legislative history of the Fees Act and in decisions of the Eighth, Ninth, and D.C. Circuits. Johnson listed twelve factors to be considered by district courts in arriving at reasonable fees awards: 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform legal services; 4)the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorne,. 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases. Id. at 717-19. These criteria are similar to those in the ABA Code of Professional Responsibility and we approve them for use in Fees Act cases within this circuit with the following observations.

As a starting point, the attorney or attorneys must submit to the court a detailed record of the time spent on the case and the duties performed. See Stanford Daily v.Zurcher, 64 F.R.D. 680, 682 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9 Cir. 1977). The court must secure from the attorneys a full and specific accounting for their time; bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed

during the hour or hours in question should be refused. Furthermore, "an attorney's record of time is not a talisman", Rainey v. Jackson State College, 551 F.2d 672, 677 (5th Cir. 1977); the district court should scrutinize it with care.

> "The trial judge should weigh the hours claimed against his own knowledge, experience and expertise of the time required to complete similar activities. If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a laywer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." Johnson v. Georgia Highway Express, Inc., supra, 488 F.2d at 717.

Once the time and labor required have been fully evaluated, the district court should apply the relevant Johnson criteria in arriving at a reasonable fee. In so doing, it would be helpful for the court to set out in the record the basis for the award and any pertinent findings of fact. See e.g., Stanford Daily v. Zurcher, Supra. Care obviously should be taken to avoid excessive fees. The "normal" per hour rate in a locale is itself an artifical construct. Actual bills will frequently be lower, sometimes much lower, than that rate might indicate; on exceptional occasions they may however exceed it. While the modest Criminal Justice Act rates might allow a more mechanical application, an assumed market place rate is never to be applied across the board without regard to the difficulty of the work, the results achieved and all other relevant factors.

As stated before, this Court did not have the benefit of sitting as the Trial Judge, neither was the Court privy to conferences that the Magistrate participated in.

First of all, the Court rules that the plaintiff is entitled to attorney's fees.

The second issue is whether the requested amount is reasonable as set forth in the criteria enunciated in King v. Greenblatt, supra. As stated the trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities. Further the court should set out in the record the basis for the award and any pertinent findings of fact.

At the outset, it is readily apparent that the file is voluminous.

It is subdivided into separate folders, entitled Motions, Pleadings, Orders, Depositions, Correspondence, Interrogatories and Memoranda. It is approximately three and a half inches in depth.

Docket entries as of today's date exceed 155 entries.

The issue was the finding of the District Court (Bownes, J.) that there was an unlawful delay by the defendants in processing claims for unemployment compensation. This was on November 15, 1977 and December 15, 1977. As stated, an appeal was taken to the First Circuit Court of Appeals, there was a remand on defendant's motion and a Consent Decree filed in this Court.

Reference is made to plaintiff's itemized bill in support of plaintiff's motion for attorney's fees. (Docket Entry 155)

Attorney Raymond J. Kelly alleges that he spent 312.5 hours non-court time and 22.45 hours court time.

His associate, Alan J. Cronheim alleges that he spent 79.05 hours non-court time and 12.10 hours court time.

Attorney Kelly seeks compensation at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time. Attorney Cronheim at the rate of $35.00 per hour non-court time and $40.00 per hour court time.

The Court does not intend, nor does it deem to be the dictate of King v. Greenblatt supra, to go through each pleading, every piece of correspondence, etc. to arrive at its ultimate conclusion of reasonable attorney's fees, but will allude to certain sections of the file. For example, plaintiff's summaries of evidence, 359 pages of transcript from the trial, defendant's summary sheets, plaintiff's 28 page pretrial memorandum of law, Discovery in the case, numerous motions to dismiss, conferences of counsel, conferences and hearings with Barry, Magistrate, depositions of Roland L. Demers, Albin R. Lane and Rodney P. Anderson, court orders, interrogatories, affidavits in support of class actions and numerous objections by counsel.

It is also evident from the file that although the case eventually was settled by a consent decree, that it was bitterly contested from May 24, 1976 until today.

The Court does not question and defendant's counsel has not produced any evidence to contradict the hours spent on this case by Attorneys Kelly and Cronheim.

Plaintiff's counsel are very competent. The Court,in State cases,has had Attorney Kelly appear before him in particular on cases and Attorney Cronheim on occasion. Without reflection on counsel, but considering the length of time they have practiced law and using the Court's experience and the shibboleths of the New Hampshire Federal and State Bar Association criteria, work involved and results obtained, the Court awards reasonable attorney's fees as follows.

For hours spent by Attorney Kelly at the rate of $40.00 per hour for non-court time and $50.00 per hour for court time or a total of $13,636.07.

For hours spent by Attorney Cronheim at the rate of $30.00 per hour non-court time and $35.00 per hour for court time or a total of $2,998.33.

Reasonable attorney's fees in the sum of $16,644.40 are awarded to Plaintiff's counsel.

Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

August 30, 1979

cc Michael M. Black, Esq.
Raymond J. Kelly, Esq.
Alan Cronheim, Esq.

NO. 80-5887

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IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD H. WHITE,

Petitioner,

-v-

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, et al.,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Upon the attached affidavit, petitioner RICHARD H. WHITE respectfully moves this Court pursuant to Rule 46 of the Rules of this Court for an order permitting petitioner to proceed before this Court in forma pauperis. Leave to proceed in forma pauperis was sought and granted below by the U.S. District Court for the District of New Hampshire.

Dated: New York, New York
December 10, 1980

Respectfully submitted,

E. RICHARD LARSON
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
212/944-9800

Counsel of Record

NO. 80-5887

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IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD H. WHITE,

Petitioner,

-v-

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, et al.,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, RICHARD H. WHITE being first duly sworm, depose and say that I am the PETITIONER, in the above-entitled case; that in support of my motion to proceed before this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present to this Court are the following:

CAN RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHICH ALLOWS 10 DAYS FOR THE FILING OF A MOTION TO ALTER OR AMEND A JUDGMENT ON THE MERITS, BE USED TO BAR AN APPLICATION FOR ATTORNEYS' FEES IN THE FACE OF THIS COURT'S DECISION IN SPRAGUE V. TICONIC NATIONAL BANK, 307 U.S. 161, 170 (1939), HOLDING THAT A FEE APPLICATION IS "NOT A REQUEST FOR A MODIFICATION OF THE ORIGINAL DECREE," AND IN SPITE OF THE FACT THAT THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 DEFINES FEES "AS A PART OF THE COSTS"?

MAY A COURT REQUIRE COUNSEL TO NEGOTIATE A FEE AWARD CONCURRENTLY WITH NEGOTIATIONS DIRECTED AT SETTLING THE MERITS OF A CASE, REGARDLESS OF THE LEGAL AND ETHICAL CONFLICTS THAT SUCH A RULE IMPOSES UPON CLASS COUNSEL?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

YES, PART-TIME, 25-30 HOURS PER WEEK.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

I AM PAID $3.10 PER HOUR (MINIMUM WAGE), EARNING BETWEEN $310 AND $372 PER MONTH. MY EMPLOYER IS FAIRFIELD MOTORS, KEENE, NEW HAMPSHIRE.

b. If the answer is no, state the date of your last employment and the amount of the salary wages per month which you received.

NOT APPLICABLE.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

NO.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

NOT APPLICABLE.

3. Do you own any cash or checking or savings account?

YES.

a. If the answer is yes, state the total value of the items owned.

CHECKING ACCOUNT ONLY: APPROXIMATELY $100.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

YES.

a. If the answer is yes, describe the property and state its approximate value.

1972 AUTOMOBILE WORTH MAYBE $500.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NORMA WHITE, MY WIFE.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard H. White

RICHARD H. WHITE

SUBSCRIBED AND SWORN TO before me this 19 day of November, 1980.

Cynthia Y Conway

NOTARY PUBLIC

NO. 80-5887

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1980

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RICHARD H. WHITE,

Petitioner,

-v-

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,

Respondents.

ORIGINAL COPY

SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980) . . . 1

Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) . . . 1

STATEMENT

In our Petition at pp.8-13, we pointed out that two courts of appeals had held that since fees are defined "as part of the costs" by the Fees Act, 42 U.S.C. §1988, fee requests are not subject to the ten-day limitation in Rule 59(e) of the Fed. R. Civ. P. governing motions to alter or amend a judgment. We also observed that the First Circuit below was the only court of appeals to apply Rule 59(e) to a request for fees under the Fees Act.

Subsequent to the filing of our Petition, no other court of appeals has followed the decision rendered by the First Circuit below. Panel decisions in other courts of appeals, however, have rejected the application of Rule 59(e) to fee requests and thus have disagreed with the position of the First Circuit in this case.

Because of these recent decisions, we submit this Supplemental Brief.

REASONS FOR GRANTING THE WRIT

Following the Fifth Circuit's seminal decision in Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980) -- holding that a request for fees "as part of the costs" under the Fees Act is not governed by Rule 59(e) -- two other panels of the Fifth Circuit have reached the same conclusion. Jones v. Dealers Tractor and Equipment Co., 634 F.2d 180, 181 (5th Cir. 1981); Van Ooteghem v. Gray, 628 F.2d 488, 497 (5th Cir. 1980).

The Seventh Circuit, in a decision which is now reported, has also held that a request for fees under the Fees Act is not governed by Rule 59(e). Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980).

Most recently, the Sixth Circuit followed the position taken in the foregoing decisions, and held that a request for fees under the Fees Act is not governed by Rule 59(e). Johnson v. Snyder, No. 79-3459 (6th Cir. January 23, 1981). A copy of the Sixth Circuit's unreported opinion is attached hereto as Appendix A for the convenience of the Court.

No court of appeals, as noted, has followed the decision of the First Circuit below.

CONCLUSION

For the reasons set forth in our Petition and in this Supplemental Brief, the Petition for a Writ of Certiorari should be granted, and the decision of the First Circuit should be summarily reversed.

Dated: New York, New York
February, 1981

Respectfully submitted,

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Of Counsel

APPENDIX A

No. 79-3459

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARY B. JOHNSON,
Plaintiff-Appellee,

v.

RICHARD H. SNYDER and MARION J. SNYDER,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed January 23, 1981.

Before: ENGEL, MERRITT and BROWN, Circuit Judges.

PER CURIAM. Plaintiff, Mary B. Johnson, sued Richard H. and Marion J. Snyder for damages and injunctive relief under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and under 42 U.S.C. § 1981 and § 1982, alleging that the defendants, owners of an apartment building, had refused to show her an apartment for rent because she is black. After a temporary restraining order was issued, Johnson withdrew her application for a temporary injunction when the defendants agreed to show her the apartment. The case ultimately went to trial, and the jury awarded damages in the amount of $1.00.

Thereafter plaintiff, whose complaint prayed for attorney's fees, filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988. At the time this motion for attorney's fees was filed, the judgment on the jury verdict had become final. Plaintiff had not, pursuant to Rule 59(e), Fed.R.Civ.Proc., moved to alter or amend the judgment within ten days after her mo-

tion for a new trial had been denied and had not, pursuant to Rule 4, Fed.R.App.Proc., within thirty days thereafter, filed a notice of appeal.

Defendants contended that the district court had no authority to entertain the motion for attorney's fees. The district court disagreed, and after a hearing, awarded such fees in the amount of $8,000.00 and costs of $118.06. 470 F.Supp. 972 (N.D. Ohio, W.D. 1979). Defendants have appealed, contending, again, that the motion for attorney's fees came too late and that, in any event, the amount awarded constituted an abuse of discretion.

We conclude that, as to the amount of the fees, such did not amount to an abuse of discretion; the award was based upon compensation at the rate of $50.00 per hour for the time consumed by the attorneys.

Defendants contend that the motion for attorney's fees came too late because plaintiff did not timely file motion to alter or amend judgment or a notice of appeal.

On this issue, we agree with the holdings of the Fifth Circuit in *Knighton* v. *Watkins*, 616 F.2d 795 (1980), and *Van Cotteghem* v. *Gray*, 623 F.2d 488 (1980), that attorney's fees awarded under § 1988 are awarded as costs and are not controlled by the time limitations that defendants here assert. We recognize that the First Circuit in *White* v. *New Hampshire Department of Employment Security*, 629 F.2d 697 (1980), refused to follow *Knighton*, *supra*, but we conclude that *Knighton* is the better reasoned opinion.

The judgment of the district court is therefore affirmed.

Office Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5887

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD H. WHITE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 10, 1980.
CERTIORARI GRANTED MAY 18, 1981.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

C. 76-71

CLASS ACTION (granted 5/11/76)

RICHARD H. WHITE,
individually and on behalf of
all others similarly situated

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY; BENJAMIN C. ADAMS, COMMISSIONER OF THE DEPARTMENT OF EMPLOYMENT SECURITY,* in his official capacity

RELEVANT DOCKET ENTRIES

1.	Motion for Leave to Proceed In Forma Pauperis ("motion allowed", 3/8/76, Caffrey, J.)	Mar. 4, 1976
2.	Complaint for Declaratory and Injunctive Relief (Raymond J. Kelly, Esq., NHLA, Manchester; George C. Bruno, NHLA, Manchester)	Mar. 8, 1976
5.	Plaintiff's Motion for Temporary Relief and Immediate Hearing	Mar. 18, 1976
8.	Defendants' Objection to Plaintiff's Motion for Temporary Relief and Immediate Hearing	Mar. 26, 1976
9.	Plaintiff's Motion to Certify the Class Action (Granted. See Order)	Mar. 29, 1976
21.	Defendant's Objection to Motion for Temporary Restraining Order	Apr. 27, 1976

* Dismissed individually 5/11/76.

RELEVANT DOCKET ENTRIES

27.	Defendant's Objection to Plaintiff's Motion to Certify the Class Action	May 3, 1976
28.	Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss, Objection to Class Certification, and Interrogatories	May 4, 1976
43.	Order, Bownes, J. (re pending motions)	May 11, 1976
45.	Defendants' Answer	May 24, 1976
46.	Plaintiffs' Motion to Compel Answers to Interrogatories (Granted, Barry, Mag. Rule 11 7/13/76)	July 2, 1976
47.	Defendant, Adams, Commissioner, Motion to Remove default granting Plaintiff's Motion to Compel Answers to Interrogatories (Granted, Barry, Mag. 7/20/76 See Pretrial Order 7/20/76)	July 16, 1976
48.	Pretrial Order, Barry, Mag. (re dis. 11/1/76; 11/15/76)	July 20, 1976
51.	Plaintiffs' Motion to Compel Answers to Interrogatories (Granted)	Aug. 17, 1976
57.	Report of Pretrial, Barry, Mag.	Sept. 13, 1976
60.	Plaintiffs' Proposed Guidelines for Redetermination of Eligibility for Unemployment Compensation Benefits After a Previous Period of Disqualification has Elapsed	Sept. 22, 1976
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81.	Stipulation of Facts	May 16, 1977
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85.	Plaintiffs' Pretrial Materials	June 3, 1977
86.	Plaintiffs' Pretrial Memorandum of Law-Preliminary Statement	June 6, 1977
87.	Defendant's Memorandum of Law	June 6, 1977
88.	Defendant's List of Contested Issues of Fact	June 6, 1977
89.	Defendant's List of Contested Issues of Law	June 6, 1977
90.	Defendant's List of Exhibits	June 6, 1977
91.	Stipulations Pertinent Applicable Law	June 6, 1977
94.	Final Pretrial Order, Bownes, J.	Aug. 19, 1977
128½.	Order, Bownes, J.	Oct. 14, 1977
131.	Plaintiffs' Post-Trial Memo	Oct. 26, 1977
132.	Defendant's Post-Trial Memo	Oct. 28, 1977
133.	Opinion, Bownes, J. by Designation	Nov. 15, 1977
134.	Judgment	Nov. 15, 1977
142.	Order, Bownes, J. (re Amendment of Order dated 11/15/77)	Dec. 16, 1977
143.	Defendants' Notice of Appeal	Dec. 27, 1977
146.	Court Reporters Transcript of Trial 10/12/77—Vol. I	July 26, 1978
147.	Court Reporters Transcript of Trial 10/13/77—Vol. II	July 26, 1978

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148.	Mandate, CCA, entered 12/11/78, remanded for entertaining a consent decree	Dec. 12, 1978
149.	Consent Decree, Devine J.	Jan. 26, 1979
150.	Judgment, Barry, Clerk	Jan. 26, 1979
152.	Plaintiff's Motion for Attorney's Fees (See Order, Loughlin, J., 8/30/79)	June 7, 1979
153.	Defendant's Objection to Motion for Attorneys Fees	June 18, 1979
154.	Plaintiff's Replication to Defendants' Objection to Motion for Attorneys' Fees	July 6, 1979
155.	Plaintiffs' Itemized Bill in Support of Motion for Attorneys' Fees	Aug. 14, 1979
156.	Plaintiffs' Memo of Law in Support of Attorneys Fees	Aug. 20, 1979
157.	Defendants' Memo of Law in Support of its Objection to Plaintiff's Request for Attorneys' Fees	Aug. 28, 1979
158.	Court's Ruling on Motion for Attorneys' Fees, Loughlin, J. (granted)	Aug. 30, 1979
159.	Defendant's Motion to Vacate Consent Decree (See Order, Loughlin, J., 10/1/79)	Sept. 13, 1979
160.	Plaintiffs' Objection to Motion to Vacate Consent Decree	Sept. 21, 1979
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. C76-71

RICHARD H. WHITE,
individually and on behalf of
all others similarly situated, PLAINTIFF

vs.

THE NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY and BENJAMIN C. ADAMS, Commissioner of the Department of Employment Security, individually and in his official capacity, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF—Filed March 4, 1976

PRELIMINARY STATEMENT

Plaintiff, individually and on behalf of all other unemployed workers in the State of New Hampshire similarly situated, brings this suit to challenge several aspects of the New Hampshire Department of Employment Security's (hereinafter DES) unemployment compensation procedures. Plaintiff challenges New Hampshire's practice and policy of failing to recertify claimants for unemployment compensation benefits when periods of disqualification have expired. The defendants DES and Adams have a policy in situations where a claimant is in continued claims filing status, R.S.A. 282:5-B(1) *et. seq.*, of ignoring the cessation of disqualification periods. The failure of DES to reopen claims and make a determination on continued eligibility or a reopened claim in a timely fashion violates the federal mandate that eligibility for benefits be determined "to insure full payment of unemployment compensation when due". Plaintiff

maintains that this practice and policy of failing to render or implement timely redeterminations of eligibility denies him due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff also challenges the failure of DES to redetermine eligibility for benefits when an appeal is pending in state court on a prior issue of disqualification for benefits. This failure to redetermine eligibility in a timely fashion contravenes the Social Security Act requirement that benefits be paid "when due", 42 U.S.C. § 503(a)(1).

In addition to final declaratory and injunctive relief, plaintiff seeks a preliminary injunction ordering the immediate determination of his eligibility for unemployment benefits pending a determination on the merits of his statutory and constitutional claims.

II. JURISDICTION

1. Jurisdiction is conferred by 28 U.S.C. § 1343(3), (4) which provides for original jurisdiction of this Court in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law or regulation or customary usage of any right, privilege or immunity security by the Constitution of the United States or by an Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

2. Plaintiff's action for declaratory and injunctive relief is authorized by:

a. 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments;

b. 42 U.S.C. § 1983, which provides for the redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and the laws of the United States.

3. Each and every act of defendants here complained of has subjected and will subject the plaintiff and members of his class to the deprivation of their rights, privileges and immunities secured by the due process clause of the Constitution of the United States.

4. Pendent jurisdiction is invoked on the issue of state law as it relates to the redetermination of unemployment compensation benefits under R.S.A. 282:5-B(2)(d).

III. PLAINTIFF

1. The named plaintiff, Richard H. White, is a citizen of the United States, 52 years old and a resident of Keene, New Hampshire. Mr. White applied for unemployment compensation benefits on March 17, 1975, and was denied by a certifying officer on April 3, 1975. As a result of an Appeal Tribunal decision on May 16, 1975, upholding the certifying officer's disqualification for 26 weeks for voluntary quit, Mr. White was declared ineligible by the Department for benefits until September 13, 1975. Although Mr. White requested that his claim be reopened on or about October 1, 1975, no action has yet been taken by the Department of Employment Security; it has been five months since the redetermination of eligibility became "due".

2. Plaintiff sues on behalf of himself, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, and on behalf of all others similarly situated. The class represented by the plaintiff is so numerous that joinder of all its members is impracticable. This class consists of all unemployed persons in the State of New Hampshire whose requests for a redetermination of eligibility after an initial disqualification have not been acted upon in a timely manner after a previous disqualification has expired. There are questions of law and fact common to the class. Plaintiff's claims are typical of the claims of the class, and the plaintiff will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class

as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

IV. DEFENDANTS

1. Defendant Benjamin C. Adams is the Commissioner of the Department of Employment Security, and in that capacity is responsible for the overall administration of that Department.

2. Defendant New Hampshire Department of Employment Security is the agency in the State of New Hampshire responsible for the administration of the unemployment compensation program which directly affects the rights of the plaintiff in the above-entitled case and members of his class.

V. FACTUAL ALLEGATIONS

1. In order to receive federal funds for the administration of the Unemployment Insurance Program in the State of New Hampshire, defendants have been required by the federal government to formulate a state plan for unemployment compensation consistent with the provisions of 42 U.S.C. § 501 *et. seq.* Title 42 U.S.C. § 503, with which such "state plan" must conform, provides in relevant part:

> (a) The Secretary of Labor shall make no certification of payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for:
>
> > (1) Such methods of administration . . . as are . . . reasonably calculated to insure full payment of unemployment compensation *when due*. . . . [Emphasis added.]

2. Under the New Hampshire Unemployment Compensation Statute, R.S.A. 282:5 *et. seq.*, an initial de-

termination of eligibility is made when an unemployed claimant files an initiating claim and a claim examiner determines, pursuant to R.S.A. 282:5-B(2), that the claim is valid.

3. The statutory provisions relating to the determination of continued eligibility for benefits provides in relevant part, as follows:

> R.S.A. 282:5-B(2)(d):
>
> . . . a determination shall be made by a certifying officer on any claim for benefits, though not an initial claim, where, in his judgment, there appears to be an issue relative to the entitlement of the claimant to benefits. The determination shall be in a manner provided in (c) immediately above and the interested parties shall be notified in the same manner. . . .

4. After an initial determination of eligibility or ineligibility is made by the defendant, his agents or employees, the claimant customarily reports weekly at his local Department of Employment Security office to sign up for additional benefits.

5. Plaintiff White filed a valid initiating claim for unemployment benefits on or about March 17, 1975, and was declared ineligible for benefits by the certifying officer of the Keene district office of DES on April 3, 1975. (See attached Appendix A.)

6. On April 3, 1975, plaintiff appealed the denial of his unemployment benefits and a hearing was held on May 8, 1975, before the Appeal Tribunal pursuant to R.S.A. 282:5-C *et. seq.* By a decision of the Appeal Tribunal dated May 16, 1975 (see attached Appendix B), the claimant was found ineligible for benefits on the grounds that:

> . . . the claimant left his employment voluntarily without good cause attributable to his employer on March 14, 1975. Benefits are disallowed from March

14, 1975, and until wages from employment are earned in each of the three weeks. . . .

. . . This work and earnings requirement shall not be required following the 26 weeks subsequent to the end of the week in which the above separation occurred.

7. The determination of the Appeal Tribunal was appealed by the plaintiff to Superior Court on June 24, 1975. See *Richard H. White* v. *Benjamin Adams, Commissioner, et. al.* (Cheshire County Superior Court, Equity No. 12312). This appeal for benefits from March to September 13, 1975, is still pending in the Cheshire County Superior Court. Upon information and belief and upon the experience of the plaintiff and his counsel, as more fully alleged hereinafter, the defendants have a policy of failing to redetermine eligibility for benefits of a claimant in a continued claim filing status because of the pendency of a state court appeal on a previous disqualification.

8. From March 17, 1975, to the present date, the plaintiff has filed claims for unemployment benefits at all proper times and in accordance with the regulations of the defendants. He has sought employment in his former occupation as a salesman. He has looked for work as a cook, bartender, truck driver, yet with no success.

9. Plaintiff's 26-week disqualification expired on September 13, 1975 (see attached Appendix C, Determination of Claims Representative—Fact Finding Report dated March 25, 1975). The Fact Finding Report by the Claims Representative, S. Field, which was approved by Paul Craig, certifying officer, dated March 31, 1975, shows a notation that a voluntary quit disqualification existed for the period March 14, 1975, to September 13, 1975, only.

10. Plaintiff White filed valid continuing claims for the months of September, October, November and Decem-

ber of 1975, and January and February of this year. Although his 26-week disqualification expired on September 13, 1975, no action has been taken by the Keene District Office of the Department of Employment Security or the main office of the defendant in Concord.* Although five months have elapsed since plaintiff's eligibility for continued benefits should have been determined, no action has been taken by the defendant Department of Employment Security or any of its employees to redetermine his eligibility for benefits.

11. Plaintiff has requested on numerous occasions from September 13, 1975, to the present date that his claim for eligibility for unemployment compensation benefits be redetermined. In fact, plaintiff has been asked by claims examiners of the defendants whether he "has received any of his checks yet". No action has been taken on this request for a redetermination pursuant to R.S.A. 282:5-B(2)(d). Plaintiff, through his counsel, has contacted counsel for the Department of Employment Security (see attached Appendix D) requesting that this long overdue determination of eligibility be processed and completed expeditiously. No response has been received to this request. Upon information and belief the intolerable delay experienced by Mr. White in having his claim for benefits reopened is not an isolated incident for hundreds of workers in New Hampshire when they seek unemployment compensation benefits after a period of disqualification, face the same delays.

12. As of the date of this complaint, no action has been taken by the Department of Employment Security, although five months have elapsed since claimant's eligibility for unemployment benefits became "due" again. The continued arbitrary refusal of the defendants to redetermine a claimant's entitlement to benefits when such a determination becomes "due" under state law

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*Plaintiff's entire file is presently in the main office of the defendant Department in the General Counsel's office where no action on redetermination can be undertaken.

R.S.A. 282:5-B(2)(d) and federal law 42 U.S.C. § 503 (a)(1), operates to deprive him of his benefits in such a capricious manner as to violate fundamental fairness required by the due process clause of the Fourteenth Amendment.

13. Pursuant to 42 U.S.C. § 503(a)(1) of the Social Security Act, a claimant for unemployment benefits has a federally protected right to a determination of his entitlement to unemployment benefits when those benefits "become" due. The arbitrary and capricious actions of the defendants and their agents in denying Mr. White a redetermination of his eligibility for benefits pursuant to R.S.A. 282:5-B(2)(d) has effectively deprived said claimant of his rights pursuant to state statute and those guaranteed him by the "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).

14. The arbitrary and capricious refusal of DES, its agents and employees to make a redetermination on the continued eligibility of Mr. White has caused the plaintiff and his family to fall into a constantly recurring pattern of debt and financial distress through no fault of their own. (See attached Financial Affidavit.)

VI. FIRST CAUSE OF ACTION

For a first cause of action, plaintiff alleges that his right to a redetermination of his eligibility for unemployment benefits pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution has been violated by the arbitrary and capricious acts of the defendant DES's failure to redetermine and reopen his unemployment claim pursuant to R.S.A. 282:5-B(2)(d).

VII. SECOND CAUSE OF ACTION

For a second cause of action, plaintiff alleges that the failure of the certifying officer and/or other employees of the defendant to make a determination "on any claim for benefits, though not an initial claim" pursuant to

R.S.A. 282:5-B(2)(d) operates to deprive the plaintiff of his right to a determination on his eligibility for benefits "when due" pursuant to the Social Security Act, 42 U.S.C. § 503(a)(1).

VIII. THIRD CAUSE OF ACTION

For a third cause of action, plaintiff alleges as a pendent state claim that the failure of the defendant Department of Employment Security and their agents to initiate a redetermination of eligibility for benefits by a certifying officer violates the state statutory mandate of R.S.A. 282:5-B(2)(d). That statute requires "the determination shall be in the manner provided in (c) immediately above and the interested parties shall be notified in the same manner."

IX. PRAYER FOR RELIEF

Wherefore, plaintiff respectfully prays on behalf of himself and all other persons similarly situated, that this honorable Court:

1. Assume jurisdiction of this cause and set this case down promptly for a hearing on temporary and permanent relief.

2. Determine by order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure that this action be maintained as a class action on behalf of all unemployed workers whose claims for unemployment benefits have not been reopened pursuant to R.S.A. 282:5-B(2)(d) after initial periods of ineligibility have expired.

3. Enter a preliminary injunction enjoining DES from failing to promptly determine within five days the reopened claim for unemployment compensation benefits pending without decision since September 14, 1975.

4. Enter a permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendant, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant plaintiff

and all other persons similarly situated prompt redetermination of eligibility for unemployment benefits when previous periods of ineligibility have expired pursuant to R.S.A. 282:5-B(2)(d) and 42 U.S.C. § 503(a)(1) of the Social Security Act.

5. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 54, 57 and 58 of the Federal Rules of Civil Procedure declaring the following:

a. That defendants' regulatory and administrative scheme, insofar as it fails to provide a redetermination of eligibility for unemployment benefits within the statutory mandate of R.S.A. 282:5-B(2)(d), deprives unemployment claimants of their rights to a fair, timely and proper administrative action as required by the due process clause of the Fourteenth Amendment to the United States Constitution.

b. That defendants' administrative scheme creates unjustifiable and arbitrary delays in the redetermination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for unemployment benefits is thereby deprived of said benefits, so as to violate his rights to a determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503(a)(1) of the Social Security Act.

6. Order the defendants, their successors in office, agents and employees, to notify promptly by first class mail, all persons whose claim for redetermination of eligibility has been pending more than fourteen (14) days that they are now eligible for such benefits and may reopen their claim.

7. Order the defendants, their successors in office, agents and employees to promulgate regulations within thirty days of judgment that will require all pending unemployment compensation claims to be acted upon within fourteen days after a previous period of disqualification has expired.

8. For such other and further relief as may be equitable and just.

Respectfully submitted,

/s/ Raymond J. Kelly
RAYMOND J. KELLY
New Hampshire Legal Assistance
59 Marlboro St., Box 59
Keene, New Hampshire 03431
(603) 352-5533

/s/ George Charles Bruno
GEORGE CHARLES BRUNO
Director
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88 Hanover Street
Manchester, New Hampshire 03101
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Robert Gross
Deputy Director
New Hampshire Legal Assistance
88 Hanover Street
Manchester, New Hampshire 03101

March 3, 1976

VERIFICATION

STATE OF NEW HAMPSHIRE
CHESHIRE, SS.

RICHARD H. WHITE, being first duly sworn, deposes and says:

That he resides at 96 Adams Street; Keene, New Hampshire;

That he is the plaintiff in the above-entitled action;

That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes them to be true.

/s/ Richard H. White
RICHARD H. WHITE
Plaintiff

ACKNOWLEDGEMENT

STATE OF NEW HAMPSHIRE
CHESHIRE, SS.

On February 27, 1976, before me, the undersigned, a Justice of the Peace in the County of Cheshire, State of New Hampshire, personally appeared RICHARD H. WHITE, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

/s/ Rosemary Davis
ROSEMARY DAVIS
Justice of the Peace

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE,
individually and on behalf of all others
similarly situated

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.

OPINION—November 15, 1977

The issue in this class action is whether the defendants' procedure in processing new claims of persons who have previously been denied unemployment compensation payments and have appealed such denial to the state courts violates the "when due" provision of the unemployment compensation section of the Social Security Act, 42 U.S.C. § 503(a)(1) and/or the Due Process Clause of the Fourteenth Amendment.

The action is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4). Plaintiffs also seek declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure.

On May 11, 1976, I granted the plaintiffs' motion to certify the case as a class action and defined the class as all present and future applicants for unemployment compensation benefits whose initial claims for benefits were denied or may be denied and whose period of disability expired or will expire prior to the filing of their renewed claim.

The underlying facts as to the procedure followed have been stipulated. I adopt the stipulations filed with slight modifications in paragraphs 2, 5, 8, 9, 10, and 16.

1. Unemployment compensation benefits paid pursuant to NH RSA 282 in New Hampshire are paid entirely out of a fund maintained by contributions paid by employers in New Hampshire. Special federal unemployment program benefits such as Supplemental Unemployment Assistance and benefits for ex-servicemen (UCX) are fully reimbursed by the federal government.

2. The common factor in this action that distinguishes the plaintiff class from other persons who file for unemployment compensation are that they have been found ineligible for benefits at some point while they were filing claims and have an appeal pending from that denial of benefits to the New Hampshire courts pursuant to NH RSA 282:5-G which provides:

> Any interested party aggrieved by any decision of an appeal tribunal in proceedings under this chapter may, within fifteen days after the date of mailing of such decision, appeal therefrom to the superior court in the manner provided in paragraph (3) of this subsection.

3. An initial claim as defined by NH RSA 282:5-B(1)(b)(1) is a claim filed for a week of benefits immediately following a seven-day period in which he has not filed a claim.

4. A continuous claim occurs when the claimant has filed for benefits on a weekly or biweekly basis without a break in his claim.

5. Unemployment compensation claimants in New Hampshire who have appealed a decision to the New Hampshire Superior Court and, while the appeal is pending, continue to file claims after the period of disqualification has ended, or file an initial claim, will not receive a determination until the certifying officer or office manager in the area office involved has received permission from the Benefit Payment Section to issue a determination.

6. When an appeal is filed in the Superior Court, NH RSA 282:5-G(3) and NH RSA 282:5G(4) require that:

The commissioner shall file with said clerk before trial a certified copy of the record on the claim which shall, upon being so filed, become part of the record of the case and part of the evidence in the case to be considered by the court.

7. When an adverse decision is appealed by a claimant, or an employer, to the Superior Court, notice is sent from the Legal Section to the Unemployment Compensation Bureau Director and the Employment Service Bureau Director to forward all claims and records on the claim that are in their possession to the Legal Section.

8. Once an appeal has been filed in the Superior Court, the area office of the New Hampshire Department of Employment Security is required to send all information on any claims filed to the Legal Section while the appeal is still pending in the New Hampshire courts.

9. While an appeal is pending in the New Hampshire court, the certifying officer or office manager of the area office involved is required by the deputy of the Unemployment Compensation Bureau (hereinafter deputy) to send a memorandum to the Legal Section, with a copy to the deputy and to the area supervisor, concerning whether or not a decision can be made on the claimant's current claim.

10. Prior to the summer of 1976, requests by certifying officers or office managers to make "determination" on claimants whose previous disqualification had elapsed and who had an appeal pending in Superior Court, would be made to the Benefit Payment Section of the Department of Employment Security with a copy of that request to the Legal Section, if the request was made in memorandum form rather than by telephone.

11. Since the summer of 1976, the Benefit Payments Section, at the direction of Roland Demers, Deputy of the Unemployment Compensation Bureau, has reviewed requests to make determinations on claimants whose appeals are pending in New Hampshire Courts by having the area supervisors meet with attorneys from the

Legal Counsel's office once a week. The majority of all claims filed by claimants who have appeals pending in the Superior Court are reviewed by an attorney and the area supervisor in this manner.

12. The area supervisors and attorneys discuss approximately six to ten cases a week where requests are sought to make new "determinations."

13. There are no specific written procedures which certifying officers or office managers are asked to follow in taking and deciding claims made by unemployment compensation claimants who have appeals pending in Superior Court. The instructions to certifying officers on how to forward claims to Legal Counsel and Benefit Payments Section have been given either through training or verbally and are not contained in any manual.

14. No specific statistical data is compiled on the length of time an individual claimant must wait between the filing of the claim and the date of the determination.

15. There are no written time guidelines published by the Benefit Payment Section of the New Hampshire Department of Employment Security that require a certifying officer or office manager to request advice or direction on whether or not a determination can or should be made.

16. However, the deputy requires that requests for determinations be made within a reasonable time. This directive is not in writing.

17. The New Hampshire Department of Employment Security state plan is at present and has during the entire period covered by plaintiffs' action been approved by the United States Secretary of Labor as required by 42 U.S.C. § 503.

There can be no question that the defendants process the claims of those who have appealed to the state court from a denial of unemployment compensation differently than those who do not appeal. If a claimant has an appeal pending in the state court from a previous denial of benefits, all subsequent claims are processed through

the Legal Section of the Department of Employment Security in conjunction with the Benefits Section. Duplicates of all claims must be filed with the Legal and Benefits Sections. The certifying officer of the area office that is handling the claim must obtain permission from the Benefits Section in Concord to make a determination on the new claim. Once permission is granted to issue a determination, the certifying officer exercises his/her independent judgment as to whether the claimant is eligible for benefits. No advice, pressure, or even a faint suggestion as to a claimant's present eligibility is made by the Benefits or Legal Sections. That decision rests solely with the certifying officer in the local office.

Two basic factual determinations must be made:

1. What delay, if any, in processing claims of the plaintiff class results from this procedure; and
2. Does such delay violate the "when due" provision of the Act?

The constitutional issue implicating the Due Process Clause of the Fourteenth Amendment is not reached if there has been a statutory violation.

Simply put, the defendants' position is that the plaintiffs have not proven any undue delay.

Plaintiffs have submitted in evidence examples of time delays experienced by eighteen members of plaintiff class. Exhibit 1. This exhibit is in the form of summaries for each of the eighteen individuals and is submitted pursuant to Rule 1006 of the Federal Rules of Evidence. The summaries are based on plaintiffs' requests for admissions, documents from defendants' exhibits regarding these cases, affidavits filed by the defendants, the testimony of plaintiffs' witnesses at the trial, and counsel's calculations. There was also entered in evidence the complete files of seventeen of the eighteen individuals.

Defendant has objected to Exhibit 1 on various grounds: that it is not accurate, that it does not contain summaries, that vital facts are omitted, and that the

exhibit does not represent a fair cross section of the plaintiff class.

I overrule the defendants' objections to this exhibit. I allow in evidence the deposition of Klupchak. Exhibit 2.

In order to save time at the trial, I allowed the defendants to file after trial an analysis by Armand Demers, DES Supervisor, of the records of each of the eighteen individuals. This analysis was based on Demers' knowledge, experience, and the computer information that was available to him.

I find that the time delay experienced by the eighteen individuals is a fair representation of the time delays experienced by the plaintiff class.

I have made a computation based on the time delays in Exhibit 1 and find that there was an average delay of seventy-three days from date of filing to date of determination.

I have also made a computation based on the time delays as set forth in the Demers summary. I have excluded from this computation any delays of over one year on the theory that they are aberrations and should not be included as part of defendants' normal processing procedure. I have included in this computation delay periods noted by Demers that were not included in plaintiffs' Exhibit 1. These periods were, in all instances, much shorter than any of the periods reflected in Exhibit 1. I find, based on Demers' summary and analysis and my modifications, that there was an average delay of thirty-four days from date of filing to date of determination.

Based on all of the evidence, I find that the delay experienced by the plaintiff class was between thirty and forty days from date of filing to date of determination.

Based on the testimony of Lane, Anderson, Armand Demers, and Roland Demers, I find that the time taken for processing claims for those persons other than the plaintiff class is less than fourteen days and that under normal circumstances it takes three days to get a check in the mail after a total week of unemployment.

The question now is whether the delay encountered by the plaintiff class violates the "when due" clause of the Act.

While there are no cases covering this particular aspect of the payment of unemployment compensation benefits, the Supreme Court has spoken generally in this area. The seminal case is *California Human Resources* v. *Java*, 402 U.S. 121, 130, 131, 133 (1971) in which the Supreme Court outlined the congressional purpose and intent of the Unemployment Compensation Act.

> The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish.
>
> • • • •
>
> Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that "when due" was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard.
>
> • • • •
>
> We conclude that the word "due" in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment.

In *Fusari* v. *Steinberg*, 419 U.S. 379, 387, 388 (1975), the Court reiterated: "The basic thrust of the statutory 'when due' requirement is timeliness" and cited *Java*, *supra*.

In *Phillips* v. *Dawson*, 393 F. Supp. 360 (W.D. Ky. 1975), the court ordered the state agency to process all uncontested employment benefit applications "in such a manner that payment be made or delivered personally to the worker within 24 days after the initial application for benefits has been filed." *Id.* at 366.

While the defendants may not intend to penalize those persons who have appealed the denial of benefits to the state court, the system it uses for processing their new claims certainly singles them out for special treatment.

The defendants have advanced a number of reasons for using this system which can be boiled down to essentially three: (1) that it is necessary for the Benefits and Legal Sections to get all of the files of those persons who have taken an appeal from an unfavorable finding so as to be able to prepare the court case; (2) that the system has been in existence since 1956; and (3) that there were special programs in 1975 and 1976 that resulted in a substantial increase in the caseload of the Department.

None of the reasons advanced convince me that the field certifying officer should have to wait for permission from the Concord office before making a determination of the claim before him.

I can understand why both the Benefits and Legal Sections must have the file information as to anyone who has appealed, but the field officer retains a copy of all the information sent to Concord. While the evidence on this was not entirely clear, I must assume that copying machines are available for use in the regional offices.

Both Concord and the field offices should know if and when an appeal to court has been taken. But the fact that an individual has exercised his statutory right to appeal from an adverse decision should not trigger a delay in determining whether he is entitled to benefits for a new claim. The field office is then considering different facts in making a determination as to whether the new claim should be allowed.

Even assuming that permission for the certifying officer to make a new determination is now made within seven days due to the new weekly conference procedure (testimony of Roland Demers), that is still seven days longer than it takes for one who does not have an appeal pending.

An increase in caseload is an understandable reason for a slowdown in processing all claims, but it does not explain disparity of the treatment inherent in the system. It should be unnecessary to point out that the fact that this procedure goes back to 1956 does not make it either immutable or reasonable.

Since the determination of whether or not the new claim should be allowed is made solely by the certifying officer in the field, no valid reason has been advanced as to why this determination should wait until the Benefits and Legal Sections in Concord have authorized the officer to make it.

Both the federal guidelines and the Department's practice establish fourteen days as a reasonable period for processing claims.

I rule that, under normal circumstances a delay of fifteen days or more between the date of filing for a claim and the date of determination violates the "when due" clause of the Act. Circumstances resulting in a general slowdown of processing all claims would not constitute a violation as to the plaintiff class.

Since I have found that the defendants' procedure constitutes a statutory violation, there is no need to discuss or rule upon the alleged constitutional violation.

WHEREFOR IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That defendants' administrative scheme creates unjustifiable and arbitrary delays in the redetermination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for such benefits is thereby deprived of them so as to violate his rights to a

determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503 (1) of the unemployment compensation section of the Social Security Act.

2. The defendants, their agents, servants and employees shall notify promptly by first class mail all persons who have cases pending in the Superior Court on appeal and whose claim for redetermination of eligibility has been pending more than fifteen days that they are now eligible for such benefits and may reopen their claim.

3. The defendants, their successors and officers, agents and employees are hereby ordered to henceforth process all claims of all present and future applicants for unemployment compensation benefits whose initial claim for benefits was denied or may be denied and who has appealed such denial to the state court and whose period of disability has expired or will expire prior to the filing of their renewed claim within fifteen days after a previous period of disqualification has expired.

SO ORDERED.

/s/ Hugh H. Bownes
United States Circuit Judge
Sitting By Designation

November 15, 1977

cc: Michael M. Black, Esq.
Raymond J. Kelly, Esq.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL.

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

ORDER—December 16, 1977

My order dated November 15, 1977, is amended to read as follows:

1. That defendants' administrative scheme creates unjustifiable and arbitrary delays in the determination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for such benefits is thereby deprived of them so as to violate his rights to a determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503 (1) of the unemployment compensation section of the Social Security Act.

2. All persons who have an appeal pending in the New Hampshire Superior Court and have claimed unemployment compensation for a week that is not already covered by a decision of the Department of Employment Security and whose intrastate claims have been pending more than fifteen days from the end of such week shall be promptly notified by first-class mail by the Department that they are now eligible for a determination and to visit an office of the New Hampshire Department of Employment Security to file claims or other appropriate action within ten days of the mailing of said notice. If the claim is an interstate one, then the pending period may be extended by not more than ten days.

3. The defendants, their successors and officers, agents and employees are hereby ordered to henceforth process all intrastate claims of present and future applicants for unemployment compensation benefits whose initial claim for benefits was denied or may be denied and who has appealed such denial to the state court and whose period of disqualification has expired or will expire prior to the filing of their renewed claim within fifteen days after a previous period of disqualification has expired. Interstate claims shall be processed within twenty-five days after a previous period of disqualification has expired.

SO ORDERED.

/s/ Hugh H. Bownes
United States Circuit Judge
Sitting By Designation

December 16, 1977

cc: Michael M. Black, Esq.
Raymond J. Kelly, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

File No. 78-1018

RICHARD H. WHITE, ET AL., PLAINTIFF, APPELLEE

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.,
DEFENDANT, APPELLANT

MOTION TO REMAND TO THE DISTRICT COURT FOR THE PURPOSES OF ENTERTAINING A CONSENT DECREE—Filed December 8, 1978

NOW COMES the Defendant-Appellant and respectfully requests that this Court remand this appeal to the District Court for the purpose of the District Court review of a proposed consent decree for the following reason:

1. The Defendant-Appellant and Plaintiff-Appellee have agreed to a consent decree in this matter.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
BENJAMIN C. ADAMS, COMMISSIONER
By his Attorney:

/s/ Michael M. Black

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1018

RICHARD H. WHITE, ETC., PLAINTIFF, APPELLEE

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.,
DEFENDANTS, APPELLANTS

ORDER OF COURT

Entered December 11, 1978

Upon motion of appellant,

It is ordered that this cause is hereby remanded to the district court for the purpose of entertaining a consent decree.

It is further ordered that mandate issue forthwith.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Black and Kelly.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action File No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFF

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, BENJAMIN C. ADAMS, COMMISSIONER, ET AL., DEFENDANT

CONSENT DECREE

1. On December 16, 1977 this Court amended its Opinion and Order issued November 15, 1977 enjoining the defendants from further action not consistent with the Court's order.

2. On December 27, 1977 the defendants appealed the November 15 and December 16, 1977 Opinion and Order.

3. The order of the District Court has been complied with.

4. The Defendants have, with few exceptions, always met the United States Department of Labor's guidelines in processing intrastate unemployment compensation claims.

5. The court order of December 16, 1977 is hereby modified. All prior orders and judgments in this action are superseded.

6. The Defendants will continue to follow the standards as currently set forth by the United States Department of Labor at 20 CFR 640.5, in processing claims of the plaintiffs. Economic circumstances resulting in a general slowdown in processing all claims or circumstances resulting in a general slowdown of an entire category of claims such as interstate claims and/or

special federal unemployment programs would not constitute a violation of this decree.

/s/ Raymond J. Kelly
Counsel for Plaintiff

/s/ Michael M. Black
Counsel for Defendants

/s/ Shane Devine
U.S. District Court Judge

January 26, 1979
Date

cc: Raymond J. Kelly, Esquire
Michael M. Black, Esquire

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL.

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, BENJAMIN C. ADAMS, COMMISSIONER, ET AL

JUDGMENT

In accordance with the approval dated January 26, 1979 of the parties Consent Decree by the Honorable Shane Devine, United States District Judge; judgment is hereby entered.

By the Court,

_____

Clerk

January 26, 1979

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

MOTION FOR ATTORNEY FEES PURSUANT TO 42 U.S.C. § 1988—Filed June 7, 1979

NOW COMES the plaintiff and the members of his class by their attorneys, New Hampshire Legal Assistance, and move this Court as follows, and says:

1. The above-entitled action was brought by the plaintiffs to enjoin the defendants from depriving them of their rights under the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983 and 42 U.S.C. § 503(a).

2. 42 U.S.C. § 1988 provides that this Court in its discretion may award reasonable attorneys fees as part of the costs to a successful litigant in an action to enforce 42 U.S.C. § 1983.

3. This Court (Bownes, J.) on November 15, 1977 and December 15, 1977 ruled in favor of plaintiff's claims concerning the unlawful delay by the defendants in processing claims for unemployment compensation benefits.

4. An appeal was taken by the defendants on December 27, 1977 to the First Circuit United States Court of Appeals.

5. Defendant's appeal to the First Circuit was remanded on December 10, 1978 on their own motion and a Consent Decree was filed with this Court, and ap-

proved by the District Court (Devine, J.) on January 26, 1979.

6. The prosecution of this complex case has heavily taxed the resources of plaintiff's counsel in terms of expenditure of funds and attorney time. Plaintiff's counsel estimates conservatively that over 250 attorney hours were spent in the preparation and presentation of this case.

7. That plaintiffs are the "prevailing party" in this action and are entitled to reasonable attorneys fees upon the filing of the Consent Decree, *see Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978).

WHEREFORE, plaintiffs respectfully request that this Court award them reasonable attorneys fees as part of the costs taxable against the defendants and order such other and further relief as may be equitable and just.

Respectfully submitted,

RICHARD H. WHITE, et al.
By Their Attorneys
NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Raymond J. Kelly

88 Hanover Street
Manchester, N.H. 03101

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

ITEMIZED BILL IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS FEES

NOW COME the plaintiffs, by their attorneys, New Hampshire Legal Assistance, and submit the following information to the Court to assist it in its determination of awarding attorneys fees to the plaintiffs.

1. All attorneys fees awarded in this case will be retained by New Hampshire Legal Assistance and no portion of said fees shall be paid to the Legal Service Corporation, Washington, D.C. *See* 45 C.F.R. § 1609, *Federal Register*, Vol. 41, No. 177, September 10, 1976.

2. Hours spent on this case by Raymond J. Kelly, Esquire are 312.35 non-court time and 22.45 hours court time. See itemized statement attached.

3. Hours spent on this case by Alan J. Cronheim, Esquire are — hours non-court time and — hours court time. See itemized statement to be submitted.

4. The hours listed in the attached itemized statements do to reflect the hours spent on this case by law students, paralegals and other support staff.

5. Attorneys fees are sought at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time for Attorney Kelly and $35.00 per hour non-court time and $40.00 per hour court time for Attorney Cronheim.

6. Total attorneys fees sought in this case are as follows:

Raymond J. Kelly, Esquire

Alan J. Cronheim, Esquire

TOTAL: 334.80 hours

Respectfully submitted,

RICHARD H. WHITE, et al.
By Their Attorneys
NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Raymond J. Kelly

88 Hanover Street
Manchester, N.H. 03101
(603) 668-2902

BILL FOR SERVICES

Raymond J. Kelly, Esquire

DATE	SERVICE	HOURS
December 8, 1975	Interview client on delay in receiving determination	1.00
December 9, 1975	Phone contact with Albion Lane, DES Certifying Officer on delay	.30
January 14, 1976	Letter sent to Albion Lane, DES Certifying Officer requesting action on White's claim	.35
February 4, 1976	Prepare letter to DES counsel on White delay	.45
February 20, 1976	Conference with client	.45
February 14, 1976	Research on § 1983 Complaint for Injunctive and Declaratory Relief	7.20

DATE	SERVICE	HOURS
February 18-19, 1976	Drafting Complaint	5.00
February 23, 1976	Review Complaint with Executive Director, New Hampshire Legal Assistance	2.45
February 25, 1976	Prepare Affidavits for Temporary Relief Interview Witnesses	3.45
March 1, 1976	Prepare Motion for Temporary Relief	1.20
March 23, 1976	Prepare Motion to Certify Class	1.00
March 25, 1976	Prepare Interrogatories & Requests to Produce	4.00
April 1, 1976	Prepare Affidavits in Support of Class Action	4.30
April 7, 1976	Interview Ronald Bogue— Intervenor	2.00
April 8, 1976	Prepare Motion & Complaint in Intervention	2.45
April 9, 12, 1976 16-17, 1976	Research on Memorandum in Opposition to Motion to Dismiss	18.00
April 13, 14, 1976	Draft Preliminary Objection to Defendant's Motion to Dismiss & Dismissing Intervenor	4.00
April 25, 26, 1976 30	Preparation of Memorandum in Opposition to Defendant's 7 different grounds for dismissal of Complaint	17.00
May 1, 1976	Prepare Affidavit of Intervenor, R. Bogue	.45
May 2, 1976	Interview witness R. Bogue	1.30
May 2, 1976	Review 10 Affidavits in Support of Class Action	3.45
May 6, 1976	Court Appearance on Motions to Dismiss (Bownes, J.)	1.00
May 17, 1976	Prepare letter to DES counsel on Interrogatories	.50
May 25, 1976	Review Defendant's 8 page Answer to Complaint	2.00

DATE	SERVICE	HOURS
June 11, 1976	Prepare letter to DES counsel on Failure to Receive Answers to Interrogatories	.45
June 25, 1976	Prepare letter to DES counsel on Interrogatories	.20
June 30, 1976	Prepare Motion to Compel Answers to Interrogatories & Requests to Produce	1.00
July 14, 1976	Prepare Memo on Preliminary Pre-Trial for Assisting Counsel	2.00
July 20, 1976	Preliminary Pre-Trial (Barry, Magistrate) & Hearing on Motion to Compel Answers to Interrogatories (Philip Mangones, Esq., for plaintiffs)	1.00
August 6, 1976	Conference with Defendant's counsel re Interrogatories	1.00
August 13, 1976	Motion to Compel on Interrogatories	.35
August 13, 1976	Motion to Take Deposition by Tape Recorder & Prepare Sample Order & Memorandum of Law in Support	3.50
August 13, 1976	Prepare Supplemental Interrogatories	2.45
August 30, 1976	Prepare for Hearing on Plaintiffs' Motion to Compel Answers & Defendant's Objection to Review of Files	2.20
September 9, 1976	Hearing (Barry, Magistrate) on Motion to Compel, Settlement Possibilities, Proposed Redetermination Guidelines (See Order of 9/13/76)	1.00
September 16, 1976 17, 1976	Pursuant to Court Order Draft Proposed Guidelines for Redetermination of Claimant's Eligibility for Benefits	3.00
September 29, 1976	Prepare letter to DES counsel on Interrogatories	.35

DATE	SERVICE	HOURS
September 30, 1976	Hearing (Barry, Magistrate) on Proposed Guidelines & all pending motions	.45
October 8, 1976	Prepare Memo to NHLA Branch Law Offices on Survey for Statistical Delays	1.20
October 22, 1976	Prepare Memo on Assignment, Review & Correlation of preliminary results of 10 county DES delay survey	3.45
November 2, 1976	Prepare Memo Assigning Additional Manpower to Review all N.H. Superior Court Dockets on DES Appeals	1.00
December 8, 1976	Prepare Memo to Branch Law Offices on Retrieval of DES case review	.35
December 9, 1976	Prepare Motion to Extend Time to Complete Discovery	.25
December 14, 1976 15, 1976	Review Cheshire; Sullivan County Superior Court dockets on DES cases	8.00
January 14, 1977 15, 1977	Review & analyze survey information on delays in redetermination of unemployment compensation eligibility	6.00
January 14, 1977	Appear in Court—Trial List	1.30
January 25, 1977	Prepare letter & list of files for DES counsel requesting opportunity to review said files pursuant to Court order	.45
February 7, 1977	Prepare follow-up letter to DES counsel on review of Department files	.25
February 18, 1977	Prepare Motion for Extension of Time to Complete Discovery	.35
February 22, 1977 23, 1977	Discussions with DES counsel on review of their files	1.50

DATE	SERVICE	HOURS
March 2, 1977	Prepare letter to DES counsel on claimant files, retainers, & scheduling depositions	.45
March 11, 1977	Hearing (Barry, Magistrate) on Defendant's Objection to Extension of Time to Complete Discovery & Compel Production of Documents	1.00
March 15, 1977	Review claimant files at DES headquarters	4.00
March 16, 1977	Deposition of Albion Lane	2.50
March 17, 1977	Review claimant files at DES headquarters	4.30
March 22, 1977	Review claimant files at DES headquarters	5.25
March 22, 1977	Conference with DES counsel re refusal to produce certain documents in file of Eva Rousseau	.45
March 23, 1977	Prepare for deposition of R. Demers & R. Anderson	3.45
March 24, 1977	Deposition of R. Demers & R. Anderson	4.00
March 25, 1977	Prepare Motion to Produce Documents	1.00
March 27, 1977 30, 1977 April 1, 1977	Prepare Requests for Admissions	12.45
March 31, 1977	Review files at DES headquarters	4.00
April 4, 1977	Prepare Motion for Continuance of Pre-Trial & Trial Date	.30
April 12, 1977	Hearing (Barry, Magistrate) on Continuance, Plaintiffs' Motion for Production of Documents & Review of Request for Admissions	1.00
April 20, 1977	Review contested documents clerk's office	1.30
April 21, 1977	Final Pre-Trial (Bownes, J.)	.45

DATE	SERVICE	HOURS
May 2, 3, 1977	Prepare settlement letter under local Rule 14(c)(1)	3.20
May 4, 1977	Prepare Motion to Determine Sufficiency of Responses & Compel Documents	3.35
May 5, 1977	Research & prepare memorandum of law on Motion to Determine Sufficiency of Responses	5.15
May 6, 1977	Hearing (Barry, Magistrate) on Request for Admissions	1.00
May 8, 1977	Prepare Stipulation of Facts for trial	4.45
May 12, 1977	Review Stipulation of Facts with DES counsel	3.50
May 13, 1977	Research & Prepare Pre-Trial Memo	3.10
May 15, 1977	Prepare Pre-Trial Memo	2.00
May 16, 1977	Prepare Proposed Stipulation of Facts and filed with clerk	4.00
May 18, 1977	Conference with co-counsel for brief writing & evid. responsibilities	.75
May 19, 1977	Research for brief	3.10
May 23, 1977	Prepare brief	4.45
May 23, 1977	Preparation of Pre-Trial Memorandum of Law	4.50
May 28, 1977	Preparation of Pre-Trial Memorandum of Law	2.00
May 30, 1977	Preparation of Pre-Trial Memorandum of Law	3.15
May 31, 1977 June 1, 1977	Preparation of Pre-Trial Memorandum of Law	3.50
June 1, 1977	Meet with opposing counsel to discuss exhibits	1.40
June 3, 1977	Preparation of Pre-Trial Materials	1.35
June 5, 1977	Write Pre-Trial Memorandum of Law	3.20

DATE	SERVICE	HOURS
June 7, 1977	Pre-Trial Preparation with co-counsel	3.35
July 1977	Call of Pre-Trial List	1.00
July 31, 1977	Preparation for Deposition of M. Klupchak	1.30
August 1, 1977	Deposition of M. Klupchak	2.05
August 2, 1977	Prepare settlement letter to DES general counsel	.50
August 10, 1977	Read Klupchak Deposition and correct from tape recording	.50
August 18, 1977	Final Pre-Trial (Bownes, J.)	.45
August 26, 1977 27, 1977	Prepare & Review Summaries of Evidence	11.00
August 31, 1977	Copy and prepare additional Summaries of Evidence	6.00
September 1, 1977 2, 1977	Interview Witnesses for Trial	4.25
September 2, 1977	Meet with co-counsel on Trial Preparation	3.10
September 4, 1977	Review DES files and outline for trial	2.05
September 5, 1977	Interview Witnesses & Continue Trial Preparation	4.00
September 18, 1977	Prepare & Review Additional Summaries of Evidence	1.40
October 3-4-5, 1977	Interview Witnesses for Trial	3.40
October 11, 1977	Discuss Trial Strategy with Director of Litigation	1.30
October 11, 1977	Review Materials for Trial	2.55
October 12, 1977	Trial	7.30
October 12, 1977	Prepare for next day of trial	1.55
October 13, 1977	Trial	6.15
October 19, 1977	Prepare Post-Trial Memorandum	3.45

DATE	SERVICE	HOURS
October 21, 1977	Prepare Objection to Demers' Opinion re Summaries of Evidence	5.50
November 21, 1977	Conference with co-counsel re Defendant's Motion for Stay of Execution	1.00
November 28, 1977	Prepare Objection to Defendant's Stay of Execution Motion	.50
November 28, 1977	Prepare Plaintiff's Objection to Defendant's Proposed Changes & Exceptions	1.00
November 30, 1977	Hearing on Defendant's Motion for Stay of Execution & Amend Judgment	.35
December 13, 1977	Plaintiff's Comments on Defendant's Proposed Changes	2.20
December 30, 1977	Prepare & File Objection to Defendant's Second Request for a Stay Pending Appeal	.50
January 25, 1978	Review Pleadings & File for Designation of Appendix	.55
January 26, 1978	Meet with Defendant's Counsel on Designation of Appendix	1.40
February 1, 1978	Review Contested Issues on Joint Appendix	1.50
March 3, 1978	Research on Issues in Defendant's Appeal	4.50
April 14, 1978	Conversation with DES Counsel re Settlement on Appeal	.30
July 27, 1978	Review Trial Transcript for Appeal	4.45
August 18, 1978	Final Review of Appendix Issues with DES Counsel & discussion of possible settlement language	2.45
September 17, 1978	Prepare Consent Decree	.40
October 6, 1978	Settlement Meeting—Portsmouth	1.30
Otcober 12, 1978	Discuss DES Consent Decree with co-counsel	1.20

DATE	SERVICE	HOURS
November 30, 1978	Review DES Counter-Proposal on Settlement	1.00
December 5, 1978	Discuss Consent Decree with co-counsel	.30
December 8, 1978	Sign Consent Decree & Discuss Implementation with DES counsel	.40
January 31, 1979	Prepare letter to DES counsel on Attorneys Fees	.20
February 28, 1979	Review DES letter on Attorneys Fees & Document Settlement Time	2.45
March 7, 1979	Prepare final letter to DES on Settlement of Attorneys Fees Issue	1.30
April 4, 1979 12, 1979	Calculate time spent on case from December 1975 through March 7, 1979	4.00

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

OBJECTION FOR MOTION FOR ATTORNEYS FEES—Filed June 18, 1979

NOW COMES the Defendant, The State of New Hampshire, Department of Employment Security and objects to Plaintiff's Motion for Attorneys fees for the following reasons:

1. During Defendant's original discussions with client's attorneys concerning settlement, Plaintiffs' attorneys stated they would waive attorneys fees.
2. Plaintiff has waited too long to request attorneys fees as the District Court approved the Consent Decree on January 26, 1979 and the Plaintiff by letter allowed the Defendant only until April 1st in which to discuss attorneys fees.
3. The granting of attorneys fees in this case would be counter-productive as the State would be penalized for good faith efforts in settling this case.
4. The Plaintiffs are not a "prevailing party" as they agreed in the Consent Decree that the Defendant could continue what it had been doing prior to filing its complaint in the Federal Court.

WHEREFORE, the Defendant respectfully requests that Plaintiffs' Motion for Attorneys Fees be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
BENJAMIN C. ADAMS, COMMISSIONER
By his Attorneys:

EDWARD F. SMITH
MICHAEL M. BLACK

/s/ Michael M. Black

Certificate of service (omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL., DEFENDANTS

REPLICATION TO DEFENDANTS' OBJECTION TO MOTION FOR ATTORNEYS FEES— Filed July 6, 1979

NOW COME the plaintiff and the members of his class and by their attorneys, New Hampshire Legal Assistance, reply to Defendants' Objection to Motion for Attorneys Fees and state:

1. Plaintiffs, as prevailing party in this extensive litigation are entitled to a just award of attorneys fees pursuant to 42 U.S.C. § 1988.

2. The First Circuit has already stated that successful plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978) quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). No special circumstances exist such that appropriate fees should not be awarded.

3. a) Defendants, in objecting to an award of fees, first state that in "original discussions" with plaintiffs' counsel plaintiffs' attorneys stated that they would waive fees. While it is true that on or about August 18, 1978, such a discussion did occur, defendants' counsel conveniently fails to include reference to the further discussions between counsel.

b) On or about October 6, 1978, counsel for both parties discussed a draft Consent Decree prepared by defendants. In that draft there was a specific provision whereby each party was responsible for its own fees and costs. Counsel for the plaintiffs quite specifically rejected this proposal for several reasons, one of which was the waiver of plaintiffs' claim for attorneys fees.

c) Further, in November, 1978, counsel for the plaintiffs provided Attorney Black a copy of *Nadeau* v. *Helgemore*, supra, thereby further indicating an intention to pursue fees.

d) The fact that the final Consent Decree, which incidentally was prepared by counsel for the defendants, did not contain a waiver of plaintiffs' right to claim attorneys fees is a further indication that fees would be pursued.

4. Defendants next contend that fees should not be awarded because plaintiffs "waited too long" to claim fees. They note that counsel for the plaintiffs asked that defendants respond to their offer to conduct settlement discussions by April 1, 1979. Again, while it is true that plaintiffs raised the April 1 date, the fact that, as a courtesy, plaintiffs did not file their motion for fees until approximately sixty days after April 1 cannot be raised as a legal basis for denying legitimately earned attorneys fees.

5. a) Defendants further claim that the granting of attorneys fees in this case would be "counter-productive" because the State would be "penalized for good faith efforts in settling this case."

b) The First Circuit, in discussing the conduct of a defendant stated, "To begin with, the good faith of defendants is not a controlling factor in determining whether or not plaintiffs merit an award. . . . From [a] policy perspective it makes no difference whether plaintiff's suit yields favorable out of court results because a good faith defendant is brought to understand the illegality of his conduct and alters his behavior or because

an unrepentant defendant grudgingly signs a Consent Decree to avoid continued litigation expenses in a lost cause. The key issue is the provocative role of the plaintiff's lawsuit, not the motivations of the defendant." *Nadeau* v. *Helgemoe*, 581 F.2d at 280.

c) Defendants can hardly claim good faith conduct when, prior to trial, they reject a proposed Consent Decree which would have simply required them to follow certain federal regulations. The fact that after losing a hotly contested trial they were willing to sign a similar Consent Decree is a sign of improved judgment and not good faith.

6. a) Defendants finally contend that fees should not be awarded because plaintiffs were not a "prevailing party."

b) As the First Circuit noted, "It is abundantly clear and the Senate Report specifically states that in general parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005 (2nd Cir. 1975) and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F.Supp. 338 (D.Ore. 1969); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970); *Aspira of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D. N.Y. 1975)." Senate Rep. No. 94-1011.

c) In the instant case, plaintiffs obtained a ruling wherein Judge Bownes stated that defendants' conduct "creates unjustifiable and arbitrary delays in the redetermination of eligibility for unemployment compensation benefits, and that an otherwise eligible claimant for such benefits is thereby deprived of them so as to violate his rights to a determination "when due" of his claim for unemployment compensation benefits pursuant to 42 U.S.C. § 503(1) of the unemployment compensation section of the Social Security Act."

d) Plaintiffs and defendants, by signing the Consent Decree in this case, did not overturn the holding in Judge Bownes' trial opinion. Instead the parties, after much discussion, were able to agree on a suitable order which remedied the statutory violation found by Judge Bownes.

e) Litigation in this case has lasted for more than three years. It is due to the persistent efforts of counsel for the plaintiffs that it has been successfully concluded. As a result, attorneys fees should properly be awarded in light of the voluminous work expended, the extensive evidence introduced and reviewed and the positive result achived.

Respectfully submitted,

RICHARD H. WHITE, et al.
By Their Attorneys

NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Alan J. Cronheim

Simeon Smith House—The Hill
Portsmouth, New Hampshire 03801

Certificate of service (omitted in printing)

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, *et al.*, PLAINTIFFS
v.
N.H. DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*,
DEFENDANTS

ITEMIZED BILL IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS FEES— Filed August 14, 1979

NOW COME the plaintiffs, by their attorneys, New Hampshire Legal Assistance, and submit the following information to the Court to assist it in its determination of awarding attorneys fees to the plaintiffs.

1. All attorneys fees awarded in this case will be retained by New Hampshire Legal Assistance and no portion of said fees shall be paid to the Legal Services Corporation, Washington, D.C. *See* 45 C.F.R. § 1609, Federal Register, Vol. 41, No. 177, September 10, 1976.

2. Hours spent on this case by Raymond J. Kelly, Esq. are 311.35 non-court time and 23.45 hours court time. See itemized statement attached.

3. Hours spent on this case by Alan J. Cronheim, Esq. are 79.05 hours non-court time and 12.10 hours court time. See itemized statement attached.

4. The hours listed in the attached itemized statements do not reflect the hours spent on this case by law students, paralegals and other support staff.

5. Attorneys fees are sought at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time for Attorney Kelly and $35.00 per hour non-court time and $40.000 per hour court time for Attorney Cronheim.

6. Total attorneys fees sought in this case are as follows:

Raymond J. Kelly, Esq.	$15,303.25
Alan J. Cronheim, Esq.	3,250.75
TOTAL	$18,554.00

Respectfully submitted,

RICHARD H. WHITE, ET AL.
By Their Attorneys

NEW HAMPSHIRE LEGAL ASSISTANCE

By /s/ Alan J. Cronheim

Simeon Smith House—The Hill
Portsmouth, New Hampshire 03801

BILL FOR SERVICES

Alan J. Cronheim, Esq.

DATE	SERVICE	HOURS
December 13, 1976	Review Rockingham County Superior Court files on DES cases	2.25
January 7, 1977	Review Strafford County Superior Court files on DES cases	1.75
May 2, 1977	Discuss settlement letter with co-counsel and review file of case	4.00
May 8, 1977	Review file on case and discuss Stipulations of Facts	2.50
May 15, 1977	Research Pre-Trial Memorandum	3.50
May 18, 1977	Conference with co-counsel to discuss Pre-Trial Memorandum	.75
May 22, 1977	Research and prepare Pre-Trial Memorandum	4.75

DATE	SERVICE	HOURS
May 23, 1977	Research and prepare Pre-Trial Memorandum	1.25
May 31, 1977	Prepare Pre-Trial Memorandum and review case file	3.50
June 2, 1977	Prepare Pre-Trial Memorandum	4.25
June 7, 1977	Pre-Trial Preparation with co-counsel	3.25
July 18, 1977	Meet with DES counsel	1.00
August 2, 1977	Discuss settlement letter with co-counsel	.25
August 16, 1977	Meet with DES counsel	.75
August 18, 1977	Final Pre-Trial Conference	.45
August 26, 1977	Prepare Summaries of Evidence	6.50
September 2, 1977	Interview witnesses for trial	1.50
September 4, 1977	Review file for trial	3.00
October 4, 1977	Interview witnesses for trial	1.00
October 10, 1977	Prepare for trial	3.00
October 11, 1977	Prepare for trial	2.50
October 12, 1977	Trial	5.30
October 12, 1977	Prepare for trial	2.50
October 13, 1977	Trial	6.00
October 19, 1977	Prepare for Post-Trial Memorandum	4.50
October 24, 1977	Prepare Post-Trial Memorandum and Objection to Demers' Opinions re Summaries of Evidence	5.00
November 21, 1977	Conference with co-counsel re Motion for Stay of Execution	1.00
November 30, 1977	Hearing on Defendant's Motion	.35
December 13, 1977	Prepare comments on Defendant's proposed Amendment of Judgment	1.00
January 26, 1978	Meet with DES counsel on appendix	1.25
August 18, 1978	Review case and meet with DES counsel to discuss settlement	3.00

DATE	SERVICE	HOURS
September 17, 1978	Prepare Consent Decree with co-counsel	.25
October 6, 1978	Meet with DES counsel to discuss settlement	1.25
October 12, 1978	Discuss Consent Decree with co-counsel	1.25
November 30, 1978	Review DES Consent Decree	1.00
December 5, 1978	Discuss Consent Decree with co-counsel	.30
March 7, 1979	Discuss Attorneys Fees with co-counsel	.50
June 27, 1979	Prepare Replication to Defendant's Objection to Motion for Attorneys Fees	2.50
July 11, 1979	Prepare Affidavit re Attorneys Fees	2.50

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

C. 76-71-L

RICHARD H. WHITE, *et al.*

vs.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

MOTION HEARING

Motion Hearing before the Honorable Martin F. Loughlin, United States District Judge, U.S. District Court, held at the United States Court House, Concord, New Hampshire on August 21, 1979, at 9:00 a.m.

APPEARANCES:

For the Plaintiff:

Raymond J. Kelly, Esq., and
Alan Cronheim, Esq.

For the Defendants:

Michael M. Black, Esq.

[2] (9:05 o'clock a.m.)

THE CLERK: The Court has for consideration this morning a hearing on motion for attorneys' fees in Civil No. 76-71, Richard H. White, et al. vs. the New Hampshire Department of Employment Security, et al.

THE COURT: Mr. Kelly?

MR. KELLY: Good morning, Your Honor. This is our motion for attorneys' fees, pursuant to 42 U.S.C., Section 1988. Before I discuss the standards that are applied in awarding attorneys' fees under this statute, I'd like, with the Court's permission, to give a brief history of the case.

Your Honor, this case was filed back in March of 1976. As the pleadings show, especially attached to the complaint, we had been in contact with the Department of Employment Security since the latter part of 1975 concerning the problems that Mr. White was having collecting his unemployment benefits. Briefly, what had happened was Mr. White had been initially disqualified from receiving unemployment benefits, and the disqualification was to run for 26 weeks. The Department had said he had voluntarily quit his job when he went into bankruptcy.

After his 26 week disqualification expired, he continued to sign up for benefits. He was told by the certifying officer, Albion Lane, in the Keene office of [3] D.E.S., there would be a decision coming pretty soon.

He came in to see New Hampshire Legal Assistance, in our Keene office, sometime in November of 1975, and said he had been waiting for almost two months at that time, and he had not received any checks, nor had he received any kind of a decision indicating whether he would receive his checks.

I was in contact with Mr. Lane, as the records in the file show, and there was a memo sent from Mr. Lane up to the Concord head office of the Department of Employment Security sometime in the early part of January of 1975, asking: Could he make a determination on Mr. White's claim?

After that, I wrote Brother Black a letter in the early part of February, I think a copy of which is attached to our complaint, telling him the problems that we were having. Brother Black and I have done a number of unemployment compensation appeals at that time, and we were trying to short circuit what might be a long and costly piece of litigation.

So, I wrote to Brother Black, and when I didn't get any response, we filed suit on March 4th, 1976.

Approximately two weeks after we filed suit, Mr. White received a retroactive check for 26 weeks of bene-

fit, at his weekly benefit amount of ninety-five dollars [4] a week. And at that point in time, we withdrew our request for preliminary relief.

After Mr. White received his preliminary relief, the Department filed motions to dismiss. In fact, I think they filed eight separate motions to dismiss, Your Honor, based on various claims of immunity, immunity of Benjamin Adams, immunity of the State, immunity of Benjamin Adams as a judicial officer. They also objected to our class action, objected to any move to intervene new claimants in the case, objected to our interrogatories that had been filed.

And so we had a hearing. Our first hearing was in front of Judge Bownes on May 6th, 1976, and the order, which is part of the records in this case, denied the motion to dismiss; granted that Benjamin C. Adams individually be dismissed from the case; but kept him in the case in his official capacity and also kept the Department in it's official capacity; the motions to strike of the Department were denied; class was certified; interrogatories were ordered to be answered; and this started the litigation and it's process.

Now, what happened after that, Judge, I think can be seen by best looking at the docket sheets that go along with these files.

Up to December 30th, 1977, there are [5] actually 146 docketings or pieces, you know, separate documents that had been filed in this case. I would imagine, now, with the request for attorneys' fees, the consent decree, the objection, and also the memo that I filed yesterday on the issue of attorneys' fees, that there are well over 150 documents in this case, now.

The problem that we had, basically, was this: We were required to look into a system that had no records, had no reporting system; and we were also required to review a substantial amount of files that the Department had kept on the various claimants in this case. Your Honor, at the time of trial I think Brother Black and

I remember that one of the side benchs up in the main courtroom was filled literally from here, expanse of my arms, were boxes filled with all the individual papers, I think it was 17 or 20 class representatives who's files had to be brought into the case as evidence in the case.

Prior to trial, however, Your Honor, at the suggestion of Magistrate Barry, and there is an order of this on September 13th, 1976, Mr. Barry recognized that this case was going to involve extensive and very voluminous discovery. He said, "You two people should sit down, let's see if we can try to work this thing out and get some kind of a settlement in the case."

And what I did at that time was to draft up [6] a proposed memorandum possible consent decree which at least was unsuccessful in getting the Department to settle the case at that time.

Subsequent to that, we were in contact with Brother Black in August, of 1976, and I wrote Brother Smith, as general counsel for the Department, and asked him if there was any possibility of settling this case based upon the federal regulations of timeliness that are in the 20 C.F.R., the Code of Federal Regulations, that attempt to settle the case prior to trial was unsuccessful.

All during this period of time, Your Honor, that is the documents indicate and, as our brief indicates, I think it was on the 10th and 11th, we were constantly in front of Magistrate Barry on the issue of what evidence we can get, what files we could review. And another words, Magistrate Barry took over the whole discovery procedure in this case.

I mentioned in the brief, at pages 14 and 15, that there were seven pre-trial hearings. I was wrong in that. I think there were nine. One of the ones that I didn't mention in here was an order of April 21st, 1977, when Judge Bownes, I think at one of our last pre-trials, ordered the Department to answer our requests for admissions. It was basically the situation we were faced with, Judge.

We had this voluminous paper information, [7] and we wanted to synthesize it, to be able to show how a system that was strictly an oral system, that did not have any written rules and regulations, how it worked and how it affected possibly up to 400 claimants a year in the State of New Hampshire.

Basically, the class that we represented were people who had been denied unemployment benefits, filed an appeal to Superior Court, and while their appeal was pending in Superior Court, they had gone back in to file a new or separate claim.

The problem that occurred: Every time a person had a case in litigation in the Superior Court, went in to file a new or separate claim, their file had to be reviewed in the Concord office, to see if an okay could be given, a determination on the new claim.

As Judge Bownes found in his order, those delays amounted up to between six and seven weeks per claimant; in the case of the named claimant, Mr. White, they stretched over six months.

As a result of that, we had to review the Department's files, but only after we had taken a county-by-county search of the Superior Court Dockets, because we were not granted access to the appeal files of the Department. The Department claimed that they are confidential. Magistrate Barry did not order them to let us review those files, even [8] though we claimed that they were class members and, therefore, we were the attorneys representing them.

So, we had to do a county-by-county review of the Superior Court Dockets to find which cases, and also to get retainers from each of those clients, to go back in and to review the Superior Court files that the Department of Employment Security had. Once we had done that, we realized that we were going to run into another problem, which was how to present all of this evidence in a timely fashion. What we did, we used the new Rules of Federal Evidence and made summaries of evi-

dence of each of the claimants; and we synthesized what we considered to be the essential facts under Rule 1006 of the Federal Rules of Evidence, and I don't think the Court has this because they gave us back the exhibits, but I'd like to give these back to the Court, if the Court wants to review it.

These are the summaries of evidence of the class representatives in this case, and there's also a copy of the requests for admissions.

Now, these were all exhibits in the case, and at the end of the case they were given back to us. And it's our contention that we probably cut the trial time in half by using summaries of evidence and only using highlighting certain named plaintiffs as though to show the Court what the delays were, what the problems were in the individual [9] offices, and how this system failed to provide benefits when they were due.

As a result of this, Judge, a two-day trial in October, 1977, Judge Bownes allowed the department's expert on computers to testify afterwards, by way of written testimony, and we were allowed to comment on that.

The Judge then issued his decision, and I think going a step further than what was normally perceived, he allowed the Department to even make purposed exceptions to his orders and allowed us to comment on the purposed exceptions.

So, this process was a process of my memorandum, it was a pre-trial brief, a post-trial brief, briefs at the time of the motions to dismiss, they were briefs filed in support of taking depositions by tape recorder; they were briefs filed on the motion to determine the sufficiency of the responses to the request for admissions; there was a lot of paperwork here, Judge. What we were trying to do was to develop a record the Court could use to understand the system.

Now, at the end of the trial, the Department appealed to the First Circuit. They ordered a transcript. Brother Black and I both thought the transcript might come in

30 or 60 days, as it was probably six months before they saw the transcript.

[10] So, during that period of time that we were waiting for the transcript to be filed, and we were filing requests to continue the case in the First Circuit, plaintiffs initiated settlement discussion with the Department, as I've mentioned in our brief. The first settlement discussions were in October, of 1978, and came about as a result of our having to meet with Brother Black to agree on a joint appendix in the case, and I mentioned to him at that time we had a purposed consent decree that we would be willing to discuss with him and, in fact, at that time that was the third consent decree that we had given to the Department.

We had given them two previous to trial, and now we had this third consent decree, we wanted to see, could be the basis for discussions on settling this case. And at that time, as our pleadings indicate, we said that, if that consent decree was the basis for settling the case, that we would be willing to discuss the possibility of waiving our fees.

Now, we never had a response to that consent decree. We sent the Department a subsequent consent decree in September, I think it was September 19th, 1978, because I have a copy of Brother Black's—Brother Black gave me a copy at one point of the consent decree, and it was the date stamped in it.

Out of that September 19th purposed consent [11] decree, we had a subsequent meeting in October, of 1978, the first week in October, of 1978, where we discussed further the possibilities of settling this case.

At that time Brother Black brought his first—the first time the Department had offered it's own consent decree in the case.

One of the sections in the consent decree said that each party will bear it's own costs and it's own fees.

In addition to the substantive objections that we had to the consent decree and to some of the language that

the Department wanted to have in the consent decree, we also said that, having each party bear it's own costs and fees was unexceptable to us, and to strengthen our position I gave to Brother Black at that time a copy of the resent First Circuit decision in Nadeau vs. Helgemoe, which is sited in our brief. The Nadeau case being one where attorneys' fees were granted by the First Circuit, subsequently ordered by Judge Bownes, after a settlement was worked out on pending litigation.

After that discussion, there were subsequent discussions with the Department of Employment Security. Brother Black got back to us during the fall, he came in with a revised consent decree, one that made no mention of attorneys' fees. This then became the basis of subsequent [12] discussions, which ended with our signing it in the early part of December, of 1978.

It was then forwarded to Judge Devine, after the First Circuit remanded the appeal back to the District Court, and it was signed by Judge Devine on January 29th, I think, 1979.

Now, Your Honor, as our brief points out, we believe based upon the summary I've given you and the fact we were the prevailing party and the District Court, that the final consent decree that was signed incorporates the federal regulations that we have been asking the Department to settle on prior to trial, that in fact we are the prevailing party and that we are entitled to reasonable attorneys' fees.

Now, in this circuit, attorneys' fees are governed by the decisions in King vs. Greenblat, which is sited in our brief, and also by Nadeau vs. Helgemoe, as far as involving consent decrees.

THE COURT: I should have told you at the beginning I spent part of yesterday and early morning going through your brief, which is very substantial.

MR. KELLY: The only point I would make, Your Honor, then about the reasonable fees of the attorneys' is this: When you look at the case and you look at the

docket page, that shows the substantial amount of work [13] that was done, the fact that one attorney from New Hampshire Legal Assistance was litigating this case up to the spring, of 1977, and it was only in the spring, of 1977, that Brother Cronheim assisted me in the case because of the fact we now had to do a county-by-county review of the Superior Court Dockets. It was only because of these additional discovery burden placed upon us in order to ascertain the size of the class and the class members, that there were two attorneys and the fact the Department, in some of it's depositions, had used two attorneys prior to trial, and this case was complex enough so there was a necessity for mutual counsel. And during trial, Brother Cronheim cross-examined almost all of the Department's witnesses. He was the one who cross-examined Brother Smith. He was also in charge of preparing the summary of evidence and lead a very, very instrumental role in this case because of the complexity of the case, because of the need for two attorneys.

So, we feel, Your Honor, the time he has spent on this case is compensable; and based upon his experience in Federal Court, the rate that he's seeking is reasonable in all respects.

The other point I would make, Your Honor, is that I think plaintiffs, during the history of this litigation, attempted at all times to reach some kind of a settlement that noted timeliness standards, that what we were [14] looking for, we were dealing with an oral system that didn't have any written regulations; and as Judge Bownes points out in his decision, there were no other cases on point involving this type of situation where someone is delayed receiving benefits because of a subsequent court appeal. To that extent, it's a very unique case that has, as far as I know in doing my research, never been duplicated in the country. We found ourself in a very unusual situation. Some of the federal regulations didn't apply, others applied to different levels of appeal; and what we sought to do was to

bring some kind of a rational time standard to the case.

We asked for that before trial; we asked for that after trial; and only while it was on appeal to the First Circuit that the Department eventually decided to settle this case based upon the same time standards that Magistrate Barry had talked to them about, that I had talked to them about prior to trial.

Since the Court has read the rest of the brief, I would rely on the rest of the brief to show that our time, Judge, we didn't put in any of the time for the para-legal and law students that helped us do the survey around the State.

THE COURT: Let me ask, perhaps I can ask opposing counsel: Is there any, and of course I haven't made up my mind one way or the other, is there any issue, [15] as far as you're concerned, on the reasonableness of the bill and the time spent? Is that going to be an issue?

MR. BLACK: Your Honor, I was going to ask the Court for some time to address their brief. I received it yesterday afternoon and I really haven't had time to review it.

I tried. I did not have time between yesterday afternoon and this morning to look it over that carefully.

THE COURT: I think you misunderstood me. My question is: Is there any issue, because they've had their bills in there for some time, as to the length of time spent on this case and whether or not that bill is reasonable, two issues at the beginning?

MR. BLACK: I think I would like to address that question, Your Honor?

THE COURT: All right. Go ahead.

MR. BLACK: I think maybe I'll start out, if Brother Kelly is finished, with a brief history, also.

This case started sometime in 1976, and there were named plaintiffs. And our defense was that, if you go through any government system and pick and choose

your people, you are going to find some that are treated correctly and some that are treated broadly. And it was our opinion that we had been making determinations on time, with some [16] exceptions.

As I cited my brief, I cited Murphy's law: If anything can go wrong, it will. Now, to jump right to the one thing that the plaintiffs say, that they had to do a lot of discovery, well what they wanted at that time was to go into all the claimants' files and see if any of them met their criteria. And not only are those files confidential under the statute, but they are also in the legal section of the Department and we felt that that would be a violation of the statute for them to go through all the files.

THE COURT: Let me stop you here, and perhaps counsel can help the Court out.

I realize this is a class action, but you had 16 or 19 individuals.

MR. KELLY: Representatives of the class, Your Honor.

THE COURT: At this point, were they willing to waive any confidentiality on their particular records?

MR. KELLY: Yes. However, what we had to do was to, even though—almost all of them were our clients initially and they were from all over the State, and we had New Hampshire Legal Assistance retainers, we were required to do with new retainers, to look at their files again, and we wanted to look at the Department's files for the interoffice memos, which, if you look in the summaries of evidence, [17] are very telling about how the behind-the-scenes administrative process worked.

What our concern was there were a lot of other people who didn't come in to see us, who didn't know about the lawsuit, who, as Brother Smith testified, there were over 400 appeals a year. Anybody who lost benefits at the appeal tribunal and appealed to Superior Court was potentially a class member of ours, and those were the people we were trying to reach.

THE COURT: All right.

MR. KELLY: We had a lot of difficulty doing that.

MR. BLACK: Now, when Brother Kelly got the releases, Your Honor, he and I sat down. We went through every one of these files so we could look at them, and I'm the one that copied all the material and I set up the exhibits for the Court and I sent the copies down to Brother Kelly, and even up to a few weeks ago, a couple of weeks before Court, I'm the one that had the copies made of the files that they requested towards the end of the time. And they were sent up and given to the Court.

It was from those files, I believe, and of course Mr. Kelly's notes from before, that their summaries were developed. But the copying was done by the State in this case.

[18] I would like to also note, and I'm not exactly sure when, but during the pendency of this action, the federal regulations changed. Originally, all States were required to have—I believe 80 percent of their determinations, payable determinations processed within 14 days.

Now, the Federal Government, in it's infinite wisdom, after about five years of this, discovered that some States have waiting weeks and some States don't, and New Hampshire didn't. What they were doing was requiring New Hampshire to process claims within 14 days because it didn't have a waiting week, and the other States 21 days because they did have a waiting week. And the Department of Labor realized that really wasn't fair, that the same amount of work had to be done and payments had to be processed in the same manner, even though there was not a waiting list.

So, the time was extended to 21 days by the federal regulations sometime I believe in the middle of 1976, and I would have to check that, Your Honor.

Once Judge Bownes issued his decision, we started talking. And one thing in Judge Bownes' decision was the Department, he found we had acted in good faith.

He said nonetheless, he found there were delays but he found no bad faith in the treatment of these claimants. And I think that's quite important.

[19] Brother Kelly and I spoke one morning about the consent decree. And at that time it was my conclusion, or after speaking with him, that once we signed a consent decree, the attorneys' fees would not be asked for if we could get rid of the darn case.

I think it is a unique case. I think it was a case that really had very little impact anywhere along the line. There is a lot of work in this case. But as far as final impact, Your Honor, I think there is very little. The Department never has attempted to not make determinations on claimants, as this Court may know, and the Department has never been afraid to make decisions.

I think, perhaps, the Judge thoughts on whether or not it was an important case could be indicated by the fact it was not recorded.

THE COURT: Are you talking about the Federal Supplement?

MR. BLACK: In the Federal Supplement. As I was saying, it was my opinion everyone was going to work, so that the attorneys' fees would not be asked for once this case was settled because it was going to take a lot of work—

THE COURT: Let me ask you a direct question and this cuts right to the heart of this issue: Are you saying that you and Brother Kelly had an agreement that [20] there wouldn't be any motion for attorneys' fees?

MR. BLACK: I'm saying at that time, which I can't even remember the meeting, that Brother Kelly told me that, if we could work this out, that they would even waive attorneys' fees. And I thought—I was astounded at that point, Your Honor.

THE COURT: Did you work it out at that time, whatever point it was?

MR. BLACK: No, we did not, Your Honor. And that's where the problem begins.

We could not agree to that consent decree. I offered one and I don't remember—I don't have a copy of mine, and I may have done it, put forward a consent decree that said no costs, no fees.

Now, I don't think, if that included attorneys' fees, but part of the problem including the attorneys' fees and the consent decree was that, in a seminar that was held, it seemed to be the consensus of those present.

You would not hold a class action hostage or consent decree hostage for a waiver of attorneys' fees.

Now, I haven't seen anything lately on that, but it became my opinion, and I was warned by my brother counsel in the office, I should not be holding the consent action hostage to attorneys' fees because I might have an ethical problem and it should not be included in the [21] consent decree. That was his opinion. He had been through the course, and I took his opinion.

I would say, Your Honor, that by finally having a consent decree in this case, counsel on both sides would have saved a considerable amount of time. The plaintiffs got what they wanted, at least appeared to; the defendant got something that it wanted; and everyone seemed to be happy.

At that point, with an $18,000 bill facing my client, I regret recommending that he sign a consent decree. And in the future, I'll be much more careful in recommendations of consent decrees.

I think that's an important thing for this Court to consider, when a decree is finally entered and attorneys' fees are then asked for and the amount is actually more than my salary at that time, a couple of thousand dollars more than my salary for the year. And during that time, not too much less than what a Judge was making in the State of New Hampshire.

THE COURT: What Judge are you talking about?

MR. BLACK: Superior Court Judge, Your Honor, if I remember back in '75 before the pay raises.

THE COURT: We were making $37,000, if you want to know.

MR. KELLY: I'll take $37,000.

[22] MR. BLACK: I'm sorry, Your Honor, I thought it was very close to $23,074.75. I would add that would be woefully underpaid.

I would like an opportunity to respond to plaintiffs' memoranda, which I received yesterday.

THE COURT: How about Friday? I don't like to drag these matters out. They keep piling up on me, too. I'll give you until Friday. Today is the 21st.

MR. BLACK: I'm going to be out of the State. If it could be extended to Tuesday, I would appreciate it.

THE COURT: Do you have any objection?

MR. KELLY: No, Your Honor.

THE COURT: All right. August 28th. All right. But I don't want to accuse you of being evasive, regardless of responding to Brother Kelly's and Brother Cronheim's brief. Again, I'm asking you, I haven't gone through the file, but just looking at it, I know it's very voluminous, are you disputing the hourly request made by Brother Kelly and the time he spent in the case? That's what I'd like to know. That is a crucial issue.

I mean, you've had this motion for some time, haven't you?

MR. BLACK: Yes, I've had the motion, Your Honor. I regret I did not figure out how much it was. I received the motion June 7th, the motion for attorneys' fees, [23] but I did not add it up.

THE COURT: See, the problem there, if you would dispute it, that means coming back here again and getting into whether or not the bill is reasonable, and I thought that would be in issue, today. Either you're going to dispute it or you're going to agree to it?

MR. KELLY: Your Honor, may I say something at this point?

Normally, under the rules, the local rules, when there is a motion, if there is an objection in the motion or an objection to what's contained in the motion, there has to be a response within ten days.

I would argue, since the Department has had almost three months, on it's face the time must be taken as reasonable.

MR. BLACK: I seem to be missing one of the pleadings.

THE COURT: I have a copy here. Why don't we take about a ten minute break, 15 minute break; and if you want to refresh your recollection on that, go ahead.

(The Court was in recess from 9:45 o'clock a.m. to 10:00 o'clock a.m.)

MR. BLACK: As to the number of hours, I have no complaint.

THE COURT: How about the hourly charge by [24] Brother Cronheim and Brother Kelly?

MR. BLACK: Your Honor, I would disagree with that for a couple of reasons, some of which I already stated to the Court. The main one—

THE COURT: Maybe you have, I probably lost sight of it. You want to repeat it

MR. BLACK: Okay. First, Your Honor, this would be more than Brother Kelly's annual salary and more than mine at that time, and 334 hours, and a 40 hour week, work week, which I don't think any of us work, we mork more than that is what I mean, Your Honor, just to make the record clear, 40 hour work week, that's eight weeks roughly.

THE COURT: Well, is it your opinion this should be geared to the salary he makes, divided by the number of hours?

MR. BLACK: I think that should be considered, along with the Judge's finding that our defense was in good faith, along with the fact that an $18,000 bill in this case I think would have a chilling affect on any State agency that's ever brought into this Court, as far as attorneys' fees, as far as having a consent decree. And I worked on this case mostly alone, Your Honor, although I did have help occasionally. Besides this fact, I'd like to file the memorandum in answer to theirs and the Court has

allowed me to do so. I have nothing else to say, Your Honor.

[25] THE COURT: I don't know: Did you give me back that? Just so my records will be complete, maybe you did?

MR. BLACK: I think I did. It was received. Yes, I found it.

THE COURT: Did you want to respond, just limited to, Brother Kelly, the attorneys' fees, please?

MR. KELLY: Just briefly, Your Honor. Your Honor, as we pointed out in our memorandum, Nadeau say's the issue of good faith is not a consideration in the awarding of attorneys' fees.

There in the Nadeau case, there was a new prison administration, there was a new warden. They undertook, at least the State claimed, voluntarily a lot of the changes in the protective custody wing in the prison. The only clear issue on which the prisoners were winners was on the library, and the Court in that case awarded $10,000 just on the issue of a prison library. Judge Bownes found that the rate for Brother Shapiro, working for New Hampshire Legal Assistance at the time, was fifty dollars an hour.

I would point out case law that says, even though people who work for the Civil Liberties Union, et cetera, you don't pay them at the hourly rate, you pay them at the prevailing rate.

Brother Black talked about the problems of [26] settling a class case. I think he confuses the Common Fund Doctrine with a case here were we have a strict and specific statutory authority to attorneys' fees.

I was doing some research yesterday, Judge, and I found a case Prandini verses The National Tea Company, 585 Federal 2d 47.

THE COURT: Which Circuit is that?

MR. KELLY: Third Circuit and cited by the First Circuit with approval. And what that case says I think it shows our good faith here again, even when you're

litigating the issues of attorneys' fees, you're entitled to the time you spent on the attorneys' fees as attorneys' fees time, another words. We didn't bill for the brief in this case, Your Honor, and in Prandini, they talk about the distinction between when you settle a common-fund-type case verses a statutory-right-to-benefits case. Prandini was a Title Seven Section Discrimination Case.

That's all I have to say, Your Honor.

THE COURT: I'll give you until the 28th. Thank you.

(Hearing adjourned at 9:40 o'clock a.m.)

Court Reporter's Certificate (omitted in printing).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

#C 76-71

RICHARD H. WHITE, ET AL.

v.

N.H. DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

COURT'S RULING ON MOTION FOR ATTORNEYS' FEES—August 30, 1979

This motion is brought under 42 U.S.C. S1988. The section provides that.

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the costs.

This case has a long history and the Court will not rehash in total the factual or chronological litany of events.

Briefly, the Attorneys for New Hampshire Legal Assistance saw the original plaintiff, Mr. White in 1975. Suit was initiated on his behalf in March, 1976. The case was heard before Judge Bownes and entailed a trial of two days. Subsequently, the case was appealed to the First Circuit. The delay in the appeal was due to the transcript not being ready for a period of six months. Upon checking the file, it is readily ascertainable that it is quite voluminous. There are over one hundred fifty entries. There was a great amount of discovery in this case and William Barry, Magistrate was present at many discovery proceedings and he attempted to have counsel cooperate in facilitating and expediting this case through discovery procedures.

Counsel for the plaintiffs had to check Superior Court records in all ten counties in order to prepare their case as it was the defendant's position that files were privileged and could not be disclosed to plaintiff's counsel. As an aside, there is an average of three hundred appeals from determinations of the defendant's department to the New Hampshire Superior Court.

The parties attempted to arrive at a Consent Decree and there was evidence at the outset that attorneys' fees and costs would be waived. These attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved by Judge Devine on January 26, 1979.

At a hearing on August 21, 1979, defendant's counsel agreed that the time spent by plaintiff's counsel was accurate, but could not and did not agree as to the amount of legal fees requested in the sum of $18,554. Cross reference is made to itemized bill in interest of plaintiff's motion for attorneys' fees filed August 14, 1979, docket marking of 155.

Of this sum of money, Attorney Raymond J. Kelly is seeking to recover $15,303.25 and Attorney Alan J. Cronheim $3,250.75 reaching the heretofore mentioned total of $18,544.00.

Reference is also made to a memorandum dated June 20, 1979 from Chief Judge Frank Coffin. While this memorandum involves fee requests under 18 U.S.C. S30006A, it does state that the reasonableness of Attorneys' fees are to be decided by the District Court Judge. The reason the Court refers to this memo is that this particular Judge did not hear the case on its merits and is doing as well as he can by reviewing the file.

Reference is made to the case of *Torres* v. *Sachs*, 538 F.2d 10 at page 13. Here the principal was stated that.

> allowable fees and expenses may not be reduced because (the prevailing party's) was employed . . . . by a civil rights organization . . . . or because the Attorney does not exact a fee.

Reference is also made to the case of *Hoitt* v. *Vitek* 495 F.2d 219. This is a case from the First Circuit involving a suit against the Warden of the New Hampshire State Prison in violation of 42 U.S.Code S1983. The District Judge, Bownes, J. allowed fees to a private attorney, but denied fees to the New Hampshire Legal Assistance attorneys. At Page 221, there is strong dictum that if the plaintiffs had been represented solely by New Hampshire Legal Assistance, then their legal fees should have been granted. Quoting from said opinion at Page 221.

> If the sole representative of the plaintiffs below had been NHLA and the district judge had reasoned, as he did, that the suit merited award under the "private attorney general" theory, we would find it difficult to discern the advancement of any legitimate policy by the denial of attorneys' fees to NHLA. See generally Note, Awards of Attorneys' Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973).

Another issue raised by the defendants is that the Consent Decree does not make them "Prevailing Parties". In general parties may be considered to have prevailed when they vindicate rights through a Consent Judgment or without formally obtaining relief. See *Nadeau* v. *Helgemoe*, 581 F. 2d 275.

Defendant's counsel has called to the Court's attention a leading first circuit case on attorneys fees. *King* v. *Greenblatt* 560 F. 2d, 1024. This case involved an appeal from the award in attorneys' fees resulting from a successful civil rights suit to improve conditions of plaintiff's confinement at a treatment center for the sexually dangerous, 42 U.S.C.A. S1988.

Quoting from pages 1026, 1027 and 1028 the Court set forth the criteria to be used.

What constitutes a reasonable attorney's fee in a particular case shall rest within the sound discretion of the district court, see *Johnson* v. *Georgia Highway Express*,

Inc. 488 F.2d 714, 717 (5th Cir. 1974). We shall, however, expect a court to adhere carefully to certain general criteria in making a discretionary award under the Fees Act.

The Fifth Circuit's decision in *Johnson* v. *Georgia Highway Express, Inc.*, supra, was cited with approval in the legislative history of the Fees Act and in decisions of the Eighth, Ninth, and D.C. Circuits. Johnson listed twelve factors to be considered by district courts in arriving at reasonable fees awards: 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform legal services; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases. Id. at 717-19. These criteria are similar to those in the ABA Code of Professional Responsibility and we approve them for use in Fees Act cases within this circuit with the following observations.

As a starting point, the attorney or attorneys must submit to the court a detailed record of the time spent on the case and the duties performed. See *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9 Cir. 1977). The court must secure from the attorneys a full and specific accounting for their time; bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours in question should be refused. Furthermore, "an attorney's record of time is not a talisman", *Rainey* v. *Jackson State College*, 551 F.2d 672, 677 (5th Cir. 1977); the district court should scrutinize it with care.

> "The trial judge should weigh the hours claimed against his own knowledge, experience and expertise of the time required to complete similar activities. If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." *Johnson* v. *Georgia Highway Express, Inc.*, supra, 488 F.2d at 717.

Once the time and labor required have been fully evalulated, the district court should apply the relevant Johnson criteria in arriving at a reasonable fee. In so doing, it would be helpful for the court to set out in the record the basis for the award and any pertinent findings of fact. See e.g., *Stanford Daily* v. *Zurcher*, *supra*. Care obviously should be taken to avoid excessive fees. The "normal" per hour rate in a locale is itself an artificial construct. Actual bills will frequently be lower, sometimes much lower, than that rate might indicate; on exceptional occasions they may however exceed it. While the modest Criminal Justice Act rates might allow a more mechanical application, an assumed market place rate is never to be applied across the board without regard to the difficulty of the work, the results achieved and all other relevant factors.

As stated before, this Court did not have the benefit of sitting as the Trial Judge, neither was the Court privy to conferences that the Magistrate participated in. First of all, the Court rules that the plaintiff is entitled to attorney's fees.

The second issue is whether the requested amount is reasonable as set forth in the criteria enunciated in *King* v. *Greenblatt*, supra. As stated the trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities. Further the court should set out in the record the basis for the award and any pertinent findings of fact.

At the outset, it is readily apparent that the file is voluminous.

It is subdivided into separate folders, entitled Motions, Pleadings, Orders, Depositions, Correspondence, Interrogatories and Memoranda. It is approximately three and a half inches in depth.

Docket entries as of today's date exceed 155 entries.

The issue was the finding of the District Court (Bownes J.) that there was an unlawful delay by the defendants in processing claims for unemployment compensation. This was on November 15, 1977 and December 15, 1977. As stated, an appeal was taken to the First Circuit Court of Appeals, there was a remand on defendant's motion and a Consent Decree filed in this Court.

Reference is made to plaintiff's itemized bill in support of plaintiff's motion for attorney's fees. (Docket Entry 155)

Attorney Raymond J. Kelly alleges that he spent 312.5 hours non-court time and 22.45 hours court time.

His associate, Alan J. Cronheim alleges that he spent 79.05 hours non-court time and 12.10 hours court time.

Attorney Kelly seeks compensation at the rate of $45.00 per hour for non-court time and $55.00 per hour for court time. Attorney Cronheim at the rate of $35.00 per hour non-court time and $40.00 per hour court time.

The Court does not intend, nor does it deem to be the dictate of *King* v. *Greenblatt* supra, to go through each pleading, every piece of correspondence, etc. to arrive at its ultimate conclusion of reasonable attorney's fees, but will allude to certain sections of the file. For ex-

ample, plaintiff's summaries of evidence, 359 pages of transcript from the trial, defendant's summary sheets, plaintiff's 28 page pretrial memorandum of law, Discovery in the case, numerous motions to dismiss, conferences of counsel, conferences and hearings with Barry, Magistrate, depositions of Roland L. Demers, Albin R. Lane and Rodney P. Anderson, court orders, interrogatories, affidavits in support of class actions and numerous objections by counsel.

It is also evident from the file that although the case eventually was settled by a consent decree, that it was bitterly contested from May 24, 1976 until today.

The Court does not question and defendant's counsel has not produced any evidence to contradict the hours spent on this case by Attorneys Kelly and Cronheim.

Plaintiff's counsel are very competent. The Court, in State cases, has had Attorney Kelly appear before him in particular on cases and Attorney Cronheim on occasion. Without reflection on counsel, but considering the length of time they have practiced law and using the Court's experience and the shibboleths of the New Hampshire Federal and State Bar Association criteria, work involved and results obtained, the Court awards reasonable attorney's fees as follows.

For hours spent by Attorney Kelly at the rate of $40.00 per hour for non-court time and $50.00 per hour for court time or a total of $13,636.07.

For hours spent by Attorney Cronheim at the rate of $30.00 per hour non-court time and $35.00 per hour for court time or a total of $2,998.33.

Reasonable attorney's fees in the sum of $16,644.40 are awarded to Plaintiff's counsel.

/s/ Martin F. Loughlin
MARTIN F. LOUGHLIN
U.S. District Judge

August 30, 1979

cc Michael M. Black, Esq.
Raymond J. Kelly, Esq.
Alan Cronheim, Esq.

THE STATE OF NEW HAMPSHIRE
U.S. DISTRICT COURT

September 1979

#C 76-71

RICHARD H. WHITE, ET AL.

v.

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EMPLOYMENT SECURITY
BENJAMIN C. ADAMS, COMMISSIONER

MOTION TO VACATE CONSENT DECREE—
Filed September 13, 1979

NOW COMES The State of New Hampshire, Department of Employment Security, Benjamin C. Adams, Commissioner in the above entitled matter and respectfully requests that this honorable Court set aside the Consent Decree approved on January 26, 1979 for the following reasons:

1. This Court on August 30, 1979 awarded attorney's fees to Plaintiff's counsel in the amount of $16,644.40 to the Defendant.
2. When the Defendant signed the Consent Decree, there was no indication that $16,644.40 of the taxpayers' money would be awarded to Plaintiff's counsel.
3. The Defendant signed the Consent Decree in good faith.
4. The signing of the Consent Decree by the Defendant was done to save Defendant's counsel time and effort that could better be used for other purposes, as

Defendant's counsel is paid by the taxpayer. The signing of the Consent Decree should have resulted in a net saving of the taxpayer's money.

5. The Plaintiffs, by consenting to the Consent Decree, had obviously concluded that this Court's order might not withstand full appellate review.

6. Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent Decree caught the Defendant by surprise, as prior to this time, Defendant had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested.

WHEREFORE, The Defendant respectfully requests that:

1. The Consent Decree proved on January 26, 1979 be vacated, and;

2. This case be allowed to proceed on appeal with the Court of Appeals as if the Consent Decree had not been entered.

Respectfully submitted,

THE STATE OF NEW HAMSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
BENJAMIN C. ADAMS, COMMISSIONER
By his Attorneys:
Edward F. Smith
Michael M. Black

/s/ Michael M. Black
MICHAEL M. BLACK

September 12, 1979
Concord, New Hampshire

Certificate of service (omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 76-71

RICHARD H. WHITE, ET AL., PLAINTIFFS

v.

N.H. DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., DEFENDANTS

PLAINTIFFS' OBJECTION TO DEFENDANTS' MOTION TO VACATE CONSENT DECREE— Filed September 20, 1979

NOW COMES, the plaintiff and his class by their attorneys and objects to the Motion to Vacate the Consent Decree because:

1. This 42 U.S.C. § 1983 civil rights action was filed on behalf of unemployment compensation claimants over three years ago, seeking declaratory and injunctive relief under constitutional and federal statutory theories of recovery.

2. After eight pre-trial hearings, (*See* Plaintiffs' Memorandum of Law in Support of Attorney's Fees, pp. 14-15 N.4) and a two day court-trial, a decision was issued by the Court (Bownes, J.) granting plaintiff and his class substantial declaratory and injunctive relief to remedy unlawful delays in receiving unemployment compensation benefits.

3. A Motion to Stay the District Court's order was denied, (Bownes, J.) no stay was sought by the defendant's from the First Circuit, and an appeal was filed.

4. While the parties awaited the trial transcript, settlement negotiations were initiated by the plaintiffs' counsel.

5. Although initial settlement negotiations included discussions of each party possibly bearing their own fees and costs, "these attempts proved nugatory" *Court's Ruling on Motion for Attorneys' Fees*, P. 2 (August 30, 1979).

6. Further discussion on the consent decree and the issues of fees was held in plaintiffs' counsel's Portsmouth office on or about October 6, 1978.

7. On or about November 18, 1978, counsel for the Department received a copy of the slip opinion in *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir., 1978) from plaintiffs which clearly indicated their intention on the issue of fees.

8. The Consent Decree was signed and approved by Chief Judge Devine on January 26, 1979 after the appeal to the First Circuit had been vacated and remanded at DES' request.

9. On January 31, 1979, plaintiff's counsel wrote DES' counsel on whether a discussion on fees pursuant to 42 U.S.C. § 1988 would be helpful.

10. Further correspondence by plaintiff's counsel to DES proved fruitless and a Motion for Fees was filed in June 1979 which the Department objected to.

11. After a hearing on August 22, 1979 before Judge Loughlin, at which time the defendant's admitted the reasonableness of plaintiff's counsel's hours spent on the case, a decision was issued on August 30, 1979 finding plaintiff's to be the prevailing parties under 42 U.S.C. § 1988, and awarding fees to plaintiff's counsel.

12. This Court found that plaintiffs did not waive their right to fees, had prevailed through the filing of a consent decree and litigated the issues thoroughly in a "bitterly contested" lawsuit so as to be entitled to fees under the standards enunciated by the First Circuit in *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977).

13. On September 12, 1979, DES filed a motion to vacate the Consent Decree, arguing surprise in the request for fees by the plaintiffs' attorneys.

14. As shown by the chronolgy of this litigation above, and the Court's opinion on the issue of fees, DES' arguments can only be characterized as frivolous indeed disingenuous.

15. In arguing against fees for plaintiffs counsel at the August 22nd hearing, the Department claimed New Hampshire Legal Assistance had waived its claim for fees. This was totally rejected by the Court.

16. Now the Department attempts to argue that it never knew about fees, and was in fact surprised by Mr. White's counsel's request. The facts of this lengthy litigation clearly refute that argument.

17. The only surprise the Department can honestly claim is to the final fee awarded, since they conceded the hours billed, but disputed only the hourly rate.

18. While Rule 60(b) of the Federal Rules of Civil Procedures does allow relief from final judgment in rare and compelling situations, "in general a party will not be granted relief from a consent judgment" 7 Moore's Fed. Practice. ¶ 60.19 at pp. 237-40. *See also Allingsmith* v. *Funke*, 421 F.2d 1350 (6th Cir. 1970).

19. The necessity of res judicata and finality of judgments can only be overcome by a "strong showing" by the Department why the consent decree should be vacated. *Goldberg* v. *Ross*, 300 F.2d 151 (1st Cir. 1962). No such showing has been made to this court.

20. If the Department disagrees with the Court's award of fees, the correct route is a direct appeal, a Rule 60(b) motion is not a proper substitute for an appeal. *Silk* v. *Sandoval*, 430 F.2d 1266 (1st Cir. 1971) *cert. den.* 402 US 1012 (1972).

21. This Court has already heard the Department's objections to fees. Its objection based on surprise has been denied, so no further delay in this three year old case should be tolerated, now that the dispute has been resolved and claimant's have the benefit of a more prompt review system when eligibility for benefits is in question.

22. Counsel have litigated this case in the District Court to an equitable conclusion that does not merit last minute tampering by the defendants.

23. Since the defendants claim of surprise on fees has already been rejected by this court, no grounds exist for the Court to even consider a Rule 60 (b) motion.

WHEREFORE, the plaintiffs' respectfully request that:

1. The Motion to Vacate the Consent Decree be denied,
2. The Court allow plaintiffs' their reasonable cost and fees in responding to this frivolous motion,
3. For such other relief as may be equitable and just.

Respectfully submitted,

RICHARD H. WHITE

By his Attorneys
NEW HAMPSHIRE LEGAL ASSISTANCE

by: /s/ Raymond J. Kelly
RAYMOND J. KELLY
88 Hanover Street
Manchester, New Hampshire

ALAN CRONHEIM
The Hill—Simeon Smith House
Portsmouth, New Hampshire

Certificate of service (omitted in printing)

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

C. 76-71-L

RICHARD H. WHITE, ET AL.

vs.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, ET AL.

MOTION HEARING

Motion Hearing before the Honorable Martin F. Loughlin, United States District Judge, U.S. District Court, held at the United States Court House, Concord, New Hampshire on October 1, 1979, at 10:30 a.m.

APPEARANCES:

For the Plaintiff:

Raymond J. Kelly, Esq. and
Alan Cronheim, Esq.

For the Defendants:

Michael M. Black, Esq.

[2] (10:30 o'clock a.m.)

THE CLERK: This morning, the Court has for consideration a hearing on motion to vacate consent decree in Civil No. 76-71, Richard H. White, et al, verses New Hampshire Department of Employment Security, et al.

MR. BLACK: I'm going to be very brief. I think my motion is quite brief, also.

My client would like the Court to vacate the consent decree, based on the fact that he was surprised by, if not the request for the attorneys' fees, at least the amount of attorneys' fees.

My client feels that both sides gave up something, a probable loss or a probable win in the First Circuit, and by signing the consent decree, that since the Court has awarded attorneys' fees and since the award of attorneys' fees came some six months after or seven months after the date of the consent decree, he would like to go forward to the First Circuit and get a final review from the Court of Appeals.

I would add, Your Honor, again, I may be repeating myself from the last time we were here on the question of attorneys' fees, at the time I felt there was an ethical problem in discussion of the attorneys' fees, at least towards the end when the consent decree was finally signed, what I have read and what is being held is, if the [3] attorneys' fees are going to a nonprofit corporation, rather than to the plaintiffs, that it's wrong to hold the attorneys' fees hostage to consent decree because the Court's order goes to the plaintiff. And however the attorneys' fees go to the attorneys directly, and unlike other cases, if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here. And that's all I want to say.

MR. KELLY: Your Honor, we filed an objection to the plaintiffs' motion to vacate the consent decree. Although they don't title it as such, it appears to be a Rule 60-b motion under the Federal Rules of Civil Procedure.

What they are attempting to do is to reopen the whole situation to allow them the opportunity to take an appeal on the merits.

I think the law is pretty clear in this area that there has to be very special and compelling circumstances for the Court, once a consent decree has been filed and approved by the District Court. And in fact in this case the consent decree was sent to the First Circuit, also. It had to be remanded before the appeal could be removed.

The law seems to be very clear, Your Honor, except in exceptional circumstances, which I don't think [4] occur here, consent decrees will not be allowed to be reopened. There hasn't been any change in the law; there hasn't been any change that would allow the Department to argue any kind of surprise.

I think, as our objection makes clear, the Department was aware of the issue of attorneys' fees. I think these issues have already been ruled upon by the Court when it issued it's decision on the attorneys' fees before.

There isn't any surprise. If there is surprise as to the amount of attorneys' fees awarded, the Department has done the proper thing. We received a notice of appeal, today; they appealed your decision to the First Circuit on the issue of attorneys' fees. If they have any problems with the amount that the Court awarded or the standards that were used, that is the proper place to go. Rule 60-b motion to try to reverse the consent decree is not proper. The Court has already ruled upon, you know, the grounds D.E.S. brings, today, for vacating the consent decree, and we feel there is no grounds, especially surprise, that exists here to allow the Court to reopen. We ask that the motion be denied.

THE COURT: Well, I think the only thing I'd like to say for the record is that I think I alluded to it before, perhaps, in awarding attorneys' fees, maybe I didn't, but we received a directive from the Chief Judge of the [5] First Circuit, stating that whenever attorneys' fees are awarded, that it's incumbent upon the Court to make a determination as to what reasonable fees are.

Of course, I fell heir to this file. The person best suited, fortunately or unfortunately, is a member of the Circuit Court, and I presume he won't sit on this case anyway. But I did the best I could from analyzing the file and going through it, which was quite voluminous. I thought I'd put that on the record.

I am aware that able counsel will bring that out, I suppose, when they argue before the First Circuit.

Anything else?

MR. BLACK: No, Your Honor.

(Hearing adjourned at 10:38 o'clock a.m.)

Court Reporter's Certificate (omitted in printing)

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

#76-71

RICHARD H. WHITE, ET AL.

v.

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EMPLOYMENT SECURITY
BENJAMIN C. ADAMS, COMMISSIONER

ORDER ON MOTION TO VACATE
CONSENT DECREE

Motion denied.

So Ordered,

October 1, 1979

/s/ Martin F. Loughlin
MARTIN F. LOUGHLIN
U.S. District Judge

CC Michael M. Black, Esq.
Raymond J. Kelly, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1536

RICHARD H. WHITE, PLAINTIFF, APPELLEE

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., DEFENDANTS, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
ALDRICH and CAMPBELL, *Circuit Judges*

Michael M. Black, with whom *Edward F. Smith* was on the brief, for appellant.

Raymond J. Kelly, with whom *Alan Cronheim* was on brief, for appellees.

August 12, 1980

CAMPBELL, *Circuit Judge*. New Hampshire Department of Employment Security (NHDES) appeals from the district court's allowance of plaintiff's post-judgment

request for attorney's fees and the court's denial of NHDES' subsequent motion to vacate a previously entered consent decree. As we find the fees request to have been filed too late, we reverse the award.

On March 8, 1976 the plaintiff, Richard M. White, commenced a class action in the United States District Court for the District of New Hampshire challenging NHDES' unemployment compensation procedures. White alleged that delays in the administration of New Hampshire's unemployment compensation program affecting certain groups of applicants worked a denial of due process and as well were violative of the so-called "when due" clause of the Social Security Act, 42 U.S.C. § 503 (a) (1).[1] The complaint alleged jurisdiction under 28 U.S.C. §§ 1343(3), (4) and 42 U.S.C. § 1983; requested class certification under Fed. R. Civ. P. 23; and sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202 and Fed. R. Civ. P. 57. The complaint did not include any request for attorney's fees.

Class certification was obtained on May 11, 1976, with the case proceeding to trial on October 12, 1977. The district court found that NHDES' scheme of administration did indeed violate the "when due" provision of the Social Security Act; the court ordered relief and judgment was entered November 15, 1977. Neither the court's opinion and order nor the judgment made any reference to a possible award of attorney's fees. The judgment was subsequently amended in respects not pertinent to the present appeal, and NHDES, on December 27, 1977, filed a timely notice of appeal.

While its appeal was pending in this court, NHDES requested and received numerous extensions of time for the filing of briefs and designation of an appendix on the ground that the parties were attempting to negotiate a settlement. Finally, on December 11, 1978, upon mo-

[1] The complaint also raised a pendent state claim alleging violations of R.S.A. 282:5-B(2)(d) which regulates certain aspects of New Hampshire unemployment compensation eligibility determination procedures.

tion of NHDES, this court ordered the "cause . . . remanded to the district court for the purpose of entertaining a consent decree." The consent decree was approved by the district court on January 26, 1979, with judgment entered on that day. Neither the consent decree nor the judgment contained mention of attorney's fees. The district court returned, after request, the appeal bond on February 28, 1979; the various exhibits apparently also were returned on or near that date.

On June 7, 1979, some four and one-half months after the district court's approval of the consent decree and its entry of judgment, plaintiffs moved for an award of attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. NHDES objected to this motion contending: 1) that plaintiffs had, during the "original discussions . . . concerning settlement," indicated that attorney's fees would be waived;[2] 2) that plaintiffs had waited "too long to request attorney's fees . . .;" 3) that an award of fees would be counter-productive as it would penalize the state despite its good faith settlement efforts; and 4) that plaintiffs were not, under the terms of the consent decree, truly the "prevailing party."

A hearing on the fee request was held, and on August 30, 1979 the district court entered an order granting a fee award in an amount in excess of $16,000. Shortly thereafter, on September 13, 1979, NHDES, over objection, moved to vacate the consent decree contending that "Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent

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[2] In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. Plaintiffs contended that they had expected the fees issue to be resolved through negotiation following the entry of judgment while NHDES basically represented that it had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree "proved nugatory."

Decree caught [NHDES] by surprise, as prior to this time, [NHDES] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." The district court, after hearing, in a terse order of October 1, 1979, denied the motion to vacate. NHDES had previously filed on September 28, 1979 a notice of appeal of the district court's award of fees, and on October 30, 1979 it filed a similar notice concerning the court's adverse ruling on its motion to vacate. The appeals were consolidated by this court's order of November 6, 1979.

I.

We dispose of this appeal focusing solely on the question of the timeliness of plaintiff's motion for fees. As we set aside the award because the request was untimely, we do not consider NHDES' alternative contention that, in light of the unexpected award, it should be allowed to withdraw its consent and that the judgment entered pursuant to such consent should therefore be vacated. We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e); such a motion must, however, be served within 10 days after entry of judgment.[3] Since the present fees request was filed long after expiration of the 10 day period, and since Fed. R. Civ. P. 6(b) prohibits a court from extending the 10 day period, the lower court was without authority to entertain plaintiff's fees request.

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[3] Rule 59(e) provides in its entirety

"Motion to Alter or Amend a Judgment. A Motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Before proceeding to amplify these views we briefly consider plaintiff's threshold argument that since NHDES did not specifically raise the Rule 59(e) argument in the lower court, it is precluded from doing so now. *See Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). The short answer to this objection is that Rule 6(b)'s proscription against the enlargement of the time for serving motions under Rule 59(e) is "mandatory and jurisdictional." *Lapiczak* v. *Zaist*, 451 F.2d 79, 80 (2d Cir. 1971); *see United States* v. *Robinson*, 361 U.S. 220, 229 (1960). Since we hold that a section 1988 fees motion must be made in time to be incorporated in the final judgment, the 10 day period prescribed by Rule 59(e) was in these circumstances the movant's last shot at achieving this result. The district court was thus without jurisdiction over the later application, and the matter of that lack of jurisdiction properly may be first raised at any stage of the proceedings, including the present appeal. *See, e.g.*, Fed. R. Civ. P. 12(b)(3).

II.

Coming to the merits of the timeliness question, our view of the procedural rules applicable to a section 1988 fees request is essentially that set out by Judge Warriner of the Eastern District of Virginia in a comprehensive opinion in *Hirschkop* v. *Snead*, 475 F. Supp. 59 (E.D. Va. 1979). Judge Warriner concluded that "the weight of authority favors the proposition that a motion for attorney's fees under § 1988 must be made within 10 days of entry of final judgment under Rule 59(e)." 475 F. Supp. at 62. The court, in the course of concluding that a final judgment had in fact been entered, rejected the argument that section 1988 fees should be treated as an item of costs governed by Fed. R. Civ. P. 54 and 58, which permit the taxing of costs, without express limit of time, after entry of judgment. The court also rejected the alternative argument that section 1988 fees were somehow so "collateral" to the main litigation as

to be eligible for treatment in isolation from the judgment therein.

When the present fees award was appealed, no circuit court had yet spoken on the timeliness issue considered in *Hirschkop*, although there existed a fair amount of circuit and district court authority on the timeliness of motions for attorney's fees made in contexts other than section 1988.[4] Most, though not all, of this authority

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[4] *E.g.*, *Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978) (in action for disability pension benefits, Fed. R. Civ. P. 59(e)'s ten-day time limitation bars successful plaintiff's request for attorney's fees filed more than 30 days after the entry of judgment) (aff'd on other grounds, although timeliness issue discussed without resolution, 589 F.2d 112 (2d Cir. 1978); *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970) (Rule 59(e)'s ten-day limitation bars request for attorney's fees filed more than two months after entry of final judgment; court concluded that it was bound to apply Rule 59 as the fee request concerned "the granting of new substantive relief") (aff'd on the basis of Rule 59(e), 446 F.2d 1366 (5th Cir. 1971); *DuBuit* v. *Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) (in patent case, "issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment . . . and not left open pending the outcome of the appeal."); *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979) (in action under Endangered Species Act, request for attorney's fees filed some 28 months after the entry of court's "final order" was barred by Rule 59(e)'s ten-day limitation or alternatively by Rule 60(b)'s one-year limitation on motions for relief from judgment); *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951) (interpreting statute governing award of attorney's fees in patent infringement case to mean "that if an award . . . is to be made . . . the [trial] judge should do so either at the time of the entry of judgment or specifically reserve jurisdiction in such judgment to do so. . . ."). *Compare Lichtenstein* v. *Lichtenstein*, 55 F.R.D. 535 (E.D. Pa. 1972) (although acknowledging that Rule 59(e) would bar a motion to amend the judgment to include attorney's fees filed after the Rule's ten-day period had expired, the court instead termed plaintiff's request as one to amend the Bill of Costs and allowed it despite timeliness objection) (rev'd on other grounds, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974)). *See also* the so-called common fund cases discussed *infra*.

pointed in the direction taken by the district court in *Hirschkop*. The first decision by a circuit court discussing the timeliness of a section 1988 fees request was handed down soon after appellate argument in the present case; this was the Fifth Circuit's decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), holding, contrary to *Hirschkop*, that attorney's fees under section 1988 were "costs" within Fed. R. Civ. P. 54(b) and 58. As Rule 58 specifically provides that "Entry of judgment shall not be delayed for the taxing of costs," and neither Rule 54(b) nor 58 purports to prescribe any period after judgment within which costs applications must be filed, the Fifth Circuit, in the absence of any contrary local rule,[5] found no bar to entertaining a fees request filed some two months after the entry of final judgment. Were we to follow the decision in *Knighton*, the present fees request and award would thus likely be timely even though filed some months after entry of final judgment. With all respect, however, we disagree with *Knighton*.

We start from the premise that a final judgment ordinarily signifies the final resolution, subject to appeal, of all claims raised in a lawsuit. *See* Fed. R. Civ. P. 54. New claims may thereafter be advanced and old ones reinstated only pursuant to rules providing, within narrowly defined circumstances, for the reopening of the judgment. *See, e.g.*, Fed. R. Civ. P. 59, 60. If this were not so, appellate tribunals would be constantly vexed by multiple appeals growing out of fragments of the same litigation, and a party could never be sure when his case had ended.[6] It follows that a prevailing party's claim for

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[5] Although there is no local rule in the District of New Hampshire providing that motions for costs be filed within some specified time after entry of judgment, a number of district courts have adopted such rules. 10 Wright & Miller, Federal Practice and Procedure § 2679 at 240 n.76.

[6] Blackstone adds a bit of historical perspective to the practical considerations underlying the well-settled concept of finality of

attorney's fees under section 1988 must be resolved before or in the final judgment unless that claim be regarded as falling within some special exception carved out by rule or practice.

Plaintiff urges two such exceptions upon us in support of the view that their failure to request fees prior to the entry of judgment or to move within 10 days to amend such judgment so as to include a fee award, is not

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judgments. He tells how Edward I, "on his return from his French dominations in the seventeenth year of his reign" found it "necessary (or convenient, in order to replenish his exchequer)" to fine rather heavily various judges for "their corruption and other malpractices. . . ." Paramount among these bad habits was the practice of "erasing and altering records," a practice apparently engaged in by "almost all of the king's justices, even the most able and upright." And these punishments were often of a sizeable amount. Sir Ralph Hengham, Chief Justice of the King's Bench is said to have been fined some 7,000 marks, a rather tidy sum considering that the Chief's annual salary was then only 60 marks. The threat of such punishment was clearly not lost on the bench, for as Blackstone relates: "The severity of which proceedings seems to have alarmed the succeeding judges, that through a fear of being said to do wrong, they hesitated at doing what was right. As it was hazardous to alter a record duly made up, even from compassionate motives . . . they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. . . ." 8 Blackstone Commentaries, 409-410.

Thus from Edward's rather severe attempt to fill his coffers and the already traditional view of the solemnity of all judgments "came the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." *La Vale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). Today, rules such as Fed. R. Civ. P. 54, 59 and 60 ease the situation somewhat, but the difficulties that would ensue were individual cases not to be organized around the principle of single and final judgment keep such escape valves the exception, not the rule.

fatal to their subsequent fee application. First plaintiff argues, as the Fifth Circuit held in *Knighton*, that section 1988 fees are properly treated as "costs," and thus specifically exempted from the requirement of resolution prior to the entry of final judgment.[7] This position is not without some support in the language of the Fees Act. The Act grants to the district court, in various specified actions, the discretion to "allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs.*" 42 U.S.C. § 1988 (emphasis added). Focusing upon this language, the Fifth Circuit concluded in *Knighton* that, "Because Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980) (footnote omitted). We are unpersuaded, however, by this analysis.[8]

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[7] Notwithstanding plaintiff's reliance on the concept that attorney's fees are taxable as Rule 54 costs, plaintiff's motion for an award of attorney's fees was not made as part of a general application for costs; apparently, in fact, no such request for costs has yet been filed by plaintiff.

[8] Apart from the argument based on "costs," *see, infra*, the Fifth Circuit in *Knighton* pointed to little in support of its conclusion that motions for section 1988 fees may be filed after judgment has been entered and the 10 day period for amending or altering such judgment has expired. *See* Fed. R. Civ. P. 59(e). To say, as did that court, that a motion for fees does not change the judgment but merely seeks what is due because of the judgment is to beg the question to be decided. Nor are the cases cited by the Fifth Circuit in *Knighton* compelling. *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991, 994-95 n.3 (D.D.C. 1974), discussed the timeliness of a request for fees in the context of the so-called common fund situation, a situation which has long been distinguished from cases like the present. *See infra.* And, *Environmental Defense Fund, Inc.* v. *Froehlke*, 368 F. Supp. 231, 251-55 (W.D. Mo. 1973), while providing thorough background information on the history of and procedure for the awarding of costs, did not discuss the question of attorney's fees generally, let alone the specific question of the timeliness of a request for such.

We do not find it clear that Congress, by generally describing attorney's fees under section 1988 as a part of the costs, meant thereby to include those fees within the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54. Rule 54(d), referring to the awarding of costs, provides, in part, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . Costs may be taxed by the clerk on one day's notice." 28 U.S.C. § 1920 adds a bit of flesh to the bones of Rule 54(d) by providing:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Examination of the above language strongly indicates that the costs allowed as of course by Rule 54(d) and detailed in 28 U.S.C. § 1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as

capable of being taxed by the clerk on one day's notice. In keeping with this idea the costs listed in section 1920 are almost all capable of routine computation, and the one arguable exception, item (6), is peculiarly within the court's own authority to establish, without input from the parties and with little likelihood of engendering controversy. Not so the discretionary award of attorney's fees under section 1988. To calculate such an award, indeed, even to determine whether one should be made at all, the district court must evaluate possibly a dozen diverse factors, *see King* v. *Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), including such factors as the novelty and difficulty of the legal questions presented and the skill required to perform the particular services provided. Moreover, in determining the propriety and size of a fee award, the district court is generally assisted by submissions from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter. Appeals often ensue—leading to the prospect of separate fees appeals if final judgment rules are disregarded—as the sizeable sums involved may impose a very substantial and bitterly disputed liability upon the losing party. Hence while such fees, like routine costs, are, to be sure, somewhat ancillary to the main dispute, they are fully capable of engendering a major controverted claim which will be closely intertwined with the merits of the primary dispute and which will require careful factual and legal analysis by the court. The considerations making it feasible to treat routine costs as an exception to final judgment rules—the ease of their computation and the fact that they almost never give rise to dispute or appeal—plainly do not apply to section 1988 attorney's fees. Thus we do not believe that a section 1988 fees award can be likened to the costs assessed routinely after entry of judgment. The potential amount of the fees award, the varied factors which must be considered by the court in reaching the fees decision, and the crucial role of the

judge and parties in reaching that final determination render the fees/costs comparison strained at best.

True, as plaintiff points out, the Supreme Court itself, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), citing the language of the Fees Act, characterized attorney's fees under section 1988 as being a part of "costs." But this statement was made in the context of rejecting the contention that the eleventh amendment stood as a bar to the awarding of fees against a state. The Court's general reasoning and ultimate conclusion that "Costs have traditionally been awarded without regard for the state's Eleventh Amendment immunity," *id.* at 695, hardly seems dispositive of the question whether section 1988 attorney's fees fall within the specific types of taxable costs contemplated by Fed. R. Civ. P. 54(d) and 58. *Cf. Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980) (costs that federal courts may impose on lawyers who unreasonably and vexatiously extend court proceedings do not include attorneys' fees under section 1988).

Plaintiff advances a second and alternative argument in support of his position that the resolution of a section 1988 fee request should be treated differently from the general run of controverted issues resolved within the contours of a court's final judgment. He suggests that his "claim for attorney's fees is a collateral and independent claim," and thus not controlled by the time limits which relate solely to the entry of judgment in the central but supposedly separate claim on the merits. Plaintiff would have us view the fee matter as a separate mini-lawsuit to be commenced, argued and resolved at some point in time following the entry of judgment in the central litigation. While plaintiff argues that this position finds support in the cases, the cited decisions involved circumstances of a different sort than those presented here. As discussed by Judge Friendly in *Fase* v. *Seafarers Welfare & Pension Plan*, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978), "cases where attorneys seek, long

after judgment, to be paid out of a fund created by the judgment, *Trustees* v. *Greenough*, 105 U.S. 527 (1882), *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), or earmarked assets whose distribution would be governed by the legal principle which plaintiff's attorney had established, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939) . . . present a lesser problem than those where allowance of a fee will result in an addition to the amount awarded by judgment. Something may also turn on whether . . . the lawyer is asserting a right of his own . . . ; in the latter type of case it is easier to characterize the proceeding as 'collateral' or 'independent.'" Here we have neither the so-called common fund situation, *see also National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds*, 546 F.2d 1003 (D.C. Cir. 1976), *cert denied*, 431 U.S. 954 (1977), nor an attorney seeking fees by asserting a right of his own rather than one of his client. *See* 42 U.S.C. § 1988 (award of attorney's fees goes to "prevailing party," rather than attorney). *But cf. Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980).

Moreover, plaintiff's contention that a section 1988 fee request is an independent claim that can be maintained after judgment runs squarely counter to the language of the Fees Act itself, which provides that "*In any action or proceeding* to enforce [appropriate civil rights statutes]" the court may, in its discretion, allow reasonable attorney's fees to the prevailing party. (Emphasis added). This language strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action.

We thus remain unpersuaded that a section 1988 fees request falls within some recognized exception—be it "costs" or a theory of independent claim—to the general rule requiring the resolution of controverted issues by a trial judge within the overall framework of the central litigation and the final judgment entered therein. Rather, our review of the relevant authority, *see, e.g.*, note 4, *supra*, including the Fees Act and the well-reasoned

Hirschkop decision previously discussed, persuades us that the timeliness of a post-judgment motion for attorney's fees made pursuant to section 1988 is properly governed by Rule 59(e)'s ten day limitation.[9] A request for a discretionary award of fees under section 1988 is intimately tied to the questions raised in, and overall merits of, the prevailing party's case, *see King* v. *Greenblatt*, 560 F.2d at 1026-27; it is a request, moreover, that may lead to a sizeable and unpredictable addition to the burdens shouldered by the losing party, *see, e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir. 1980) (affirming fee award of $115,483.75); *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979) (award well in excess of $200,000). The ultimate award of fees is, in our view, clearly a part of the overall relief sought and granted during the course of a particular civil rights action. Not only will it often be more economical of a court's time to resolve fees requests prior to entry of judgment rather than having them surface for the first time weeks or even months thereafter, but so doing ensures certainty as to the scope and finality of the judgment, *see Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363, 367 (E.D.N.Y. 1978), and at the same time reflects and re-enforces the strong policy against piecemeal appeals. *Wright* v. *Jackson*, 522 F.2d 955, 957 (4th Cir. 1975) (Aldrich, J.).

Indeed, the present case highlights many of the problems which would likely be frequently encountered were we not to endorse the position that Rule 59(e)'s ten day limitation marks, in terms of time, the outer limits of a fees request. The protraction here of a dispute previously, to all appearances, resolved is clearly not an occurrence to be encouraged. A court, having set its hand to the plow on the central litigation, should complete

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[9] We need not now address the question whether and in what circumstances the time limits established in other Rules permitting the opening of judgments might apply to a section 1988 fees request.

the furrow all at one time. The present post-judgment motion for an award, coming as it did nearly five months after judgment, was in our view too late.

We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, *see, e.g., Ben David* v. *Travisono*, No. 79-1186, slip op. at 6 n.2 (1st Cir. May 16, 1980); the state of the law has surely been such as to suggest the wisdom of that course.

Our decision will not prevent a district court from granting prompt and effective relief in a civil rights case. Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, *see Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980), but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the means to ensure, when necessary, the appealability of such a judgment. Under Fed. R. Civ. P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibility. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case.

Nor in a consent decree context do we see anything wrong with requiring the parties face up to the issue of fees in their settlement negotiations. *Cf. Regalado* v. *Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978) (expressing

concern over the propriety of injecting the issue of fees into settlement negotiations). Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court; further, they may, of course, decide to waive fees altogether. But there is nothing whatever to be encouraged in the path followed here—leaving the matter of fees unmentioned in the settlement and then raising it unilaterally several months later under circumstances that cast a shadow upon the settlement itself. Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist.

As plaintiff's fees claim was filed out of time, it should not have been entertained, and we hold the district court was without jurisdiction to make any award.

The fees award entered by the district court is vacated.

SUPREME COURT OF THE UNITED STATES

No. 80-5887

RICHARD H. WHITE, PETITIONER

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 18, 1981

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80-5887

NO. A-414

In the
SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

October Term, 1980

RICHARD H. WHITE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF
EMPLOYMENT SECURITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

A. Is the decision of the Court of Appeals, finding that fee awards under 42 U.S.C. §1988 are not costs under Rule 54(d) and that fee awards are a part of the action and not collateral or independent claims, consistent with the decisions of this Court?

B. Is the court's decision urging the parties to negotiate or address the question of fees along with the merits of the action proper?

C. Does the court's decision encourage final settlement of the entire proceeding and is it in the interest of judicial economy?

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APPENDIX. A-1

A. Decision Under Review of the United States Court of Appeals for the First Circuit.

*List of Parties, Citations to Opinions and Judgments and Statement of Jurisdiction omitted Pursuant to Supreme Court Rule 35 .2.

I. STATEMENT OF THE CASE

In the U.S. District Court for the District of New Hampshire the petitioners filed a class action complaint on March 8, 1976 alleging that the New Hampshire Department of Employment Security (hereinafter the Department) failed to make timely determinations concerning the eligibility of certain claimants who filed for unemployment compensation benefits, in violation of the Social Security Act. 42 U.S.C. §503(a)(1). The petitioners also alleged that the Department procedures denied the petitioners due process of law as guaranteed by the 14th Amendment of the United States Constitution. The relief requested was declaratory and injunctive. There was no mention in the complaint of attorney's fees.

On December 16, 1977, after a trial, the District Court entered a final order enjoining the Department to make determinations in less than the time limits established by the Social Security Act. and Regulations. The Department timely appealed to the Court of Appeals.

Before briefs were due in the Court of Appeals, the Petitioners initiated settlement negotiations with the Department. In the course of those negotiations petitioners initially suggested that attorney's fees would be waived, but no written agreement to that effect was signed. Upon the request of the Department the action was remanded to the district court where the Department consented to a decree on the statutory violation. The decree was silent as to attorney's fees. Judgment on that consent decree was entered on January 26, 1979.

Petitioners' attorney filed a motion for attorney's fees pursuant to 42 U.S.C. §1988 (hereinafter Fees Act) on June 7, 1979, almost five months after judgment. The Department objected to that motion, and moved to vacate the consent decree if fees were allowed. The district court overruled the objection to fees and denied the motion to vacate the consent decree.

The Department timely appealed to the Court of Appeals, which reversed the fee award of the District Court, holding that the petitioners' motion for attorney's fees, filed almost five months after entry of judgment, was not filed timely under F.R.C.P. 59(e).

The court ruled that the parties to an action must "face the issue" of attorney's fees in their settlement negotiations. It suggested the parties settle the question, or provide for submission of the entire question of fees to the court at the time of approval of the consent decree. The court held that, failing either of those resolutions, motions for fees under the Fees Act are modification of the judgment, and must be filed within ten days after entry of judgment, as prescribed by F.R.C.P. 59(e).

II. SUMMARY OF ARGUMENT

The First Circuit's decision recognizing that attorney's fees under the Fees Act are not taxable costs as contemplated by F.R.C.P. 54(d) is consistent with this Court's decision in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S., 412 (1978). In Christiansburg this Court denied fees to the prevailing defendant. This is contrary to Rule 54's general language allowing the taxation of costs, as used in that rule, as a matter of course to the prevailing party.

In the case at bar fees were neither requested in the complaint, nor mentioned in the consent decree. Petitioners never requested or moved for costs pursuant to Rule 54, and did not file a request for any fees until almost five months after the consent decree had gone to judgment.

The opinion of the Court of Appeals is correct. Not only does it follow statutory mandates and the decision of this Court, it also recognizes that defendants have a right to expect that an action has ended once it has gone to final judgment. The decision promotes judicial economy as it requires both remedies, i.e., injunctive relief and attorney's fees, allowed under 42 U.S.C. §1983, et seq and other similar statutes to be combined and litigated in one continuous action.

Requiring the parties to face the issue of fees in their negotiations is consistent with the decisions of the Third and Ninth Circuits. The decision does not require the parties to resolve the issue, merely face it. If, for any reason, fees cannot be negotiated, the issue of fees can be reserved for negotiation at a later date or submitted to the court to be resolved at the time of consideration of the consent decree. If none of these things are done then a motion for fees must be filed within the 10 day limit of F.R.C.P. 59(e). The decision serves the interests of the courts and parties as it promotes prompt adjudication of all remedies. The decision should not be disturbed.

III. REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Contrary to Petitioner's allegation, the First Circuit's carefully thought out, well-reasoned decision is fully consistent with the decisions of this Court. Respondent has discovered no opinions issued by this Court that directly conflict with the First Circuit's decision in this case.

Cited frequently by petitioner is the case of Hutto v. Finney, 437 U.S. 678 (1978). Hutto merely stands for the proposition that attorney's fees under the Fees Act can be awarded against the State under the Fourteenth Amendment. Dicta in the decision does speak of attorney's fees being "costs". However, whether or not attorney's fees under the Fees Act are costs to be taxed under F.R.C.P. 54(d) was not addressed.

1. Fee awards under 42 U.S.C. §1988 are not "costs" under Rule 54(d)

The court properly rejected the theorty that attorney's fees are taxable costs under 54(d). It recognized that attorney's fees are substantially different than the usual costs taxed by the clerk of the court. Attorney's fees are not easily calculated by the court nor are they a known quantity. As stated by the court, the costs allowed

> "...by 54(d) and detailed in 28 U.S.C. §1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as capable of being taxed by the clerk on one day's notice..." A.10

Other factors show that attorney's fees are not "costs". The court itself must rule on a request for fees under the Fees Act but the clerk has the power to tax costs. The court must evaluate possibly a dozen diverse factors including such items as the novelty and difficulty of the legal question presented and the skill required to present the case. See King v. Greenblatt, 560 F.2d 1024, 1026 (1st Cir. 1977), cert. den. 438 U.S. 916 (1978). The taxing of costs does not usually engender controversy in lititgation among the parties. Costs are usually taxed as a matter of course by the clerk. In contrast, more often than not, it is necessary for the court to hold a hearing and receive evidence on the question of an attorney's fees award.

The substantial differences between taxable costs and attorney's fees awards is best exemplified by this Court's decision in Christiansburg Garment Co. v. Equal Employment Opportunity Commission 434 U.S. 413 (1978). This Court in Christiansburg refused to award attorney's fees to the prevailing defendant. This court ruled that those defending civil rights actions will not be awarded attorney's fees absent bad faith and/or harassment by the plaintiffs allegedly seeking to enforce a federal right. Rule 54, on the other hand, contemplates awarding costs covered by that rule to prevailing parties as a matter of course, absent any statutory bar to such an award. There is no statutory bar present in the language of the Fees Act, it merely states that award should made to the prevailing party. Classifying fees as costs within the meaning of Rule 54 is contrary to this Court's decision in Christiansburg. Attorney's fees cannot and should not be equated with taxable costs.

2. Attorney's fees under the Fees Act are a part of the action, not collateral or independent claims.

Applications for attorney's fees are part of a plaintiff's claims in the action, not collateral and independent. The First Circuit correctly recognized that the statute provided that:

> " 'in any action or proceeding to enforce [appropriate civil rights statutes] the court may in its discretion allow reasonable attorney's fees to the prevailing party (emphasis added).' This language strongly indicates that the fee issue is one properly viewed as properly belonging in the main body of the already commenced civil rights action." A.13

Thus, a claim for fees is an integral part of the action. The request for fees was a request to modify that final judgment and cannot survive the 10 day jurisdictional limit of Rule 59(e). When judgment was entered it was the final order terminating the litigation.

There are claims for attorney's fees that are not affected by final judgment. Two such special circumstances are described by Judge Warriner in Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979) appeal docketed (4th Cir. No. 79-1490). The first is

a collateral or independent claim, that arises when attorneys or parties seek their fees under the "Common Fund Theory" from a pool of assets created by the litigation. Id. at 63, See A, 12, Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978). This Court's decision in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), allowing fees outside the jurisdictional limit (under the old Federal Rules), did so under the "Common Fund Theory". In Sprague, plaintiff prevailed. As a result of her success others were benefited by the doctrine of stare decisis. A fund of earmarked bonds was created by the action. This Court allowed fees finding that the action for fees was an action for assets created by the first decision and was "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree...". Id. at 170. This present action created no fund nor were any money damages ever requested until petitioners filed their motion for fees.

The second circumstance noted in Hirschkop, supra at 64 is where the attorney seeks to enforce a right of the attorney, not a right of the client. An example of such an award would be a request for attorney's fees under the Social Security Act 42 U.S.C. §406, and regulations thereunder, awarding fees directly to the attorney. The language of the Fees Act is clear; the award goes to the prevailing party. The attorney has no independent right.

The defendants in this case had a right to believe the action had ended once the consent decree went to judgment. Plaintiff's complaint did not request fees. None of the court's orders awarded fees. The consent decree did not mention fees, and no motion for "costs" was ever filed by petitioners in any court.

Attorney's fees under the Fees Act are part of the main body of the civil rights action. A.13 They are not independent or collateral claims and cannot survive entry of final judgment.

B. THE COURT'S DECISION URGING THE PARTIES TO NEGOTIATE OR ADDRESS THE QUESTION OF FEES IS PROPER.

The decision below requires the parties to "face up" to the issue of attorney's fees in their settlement negotiations. A. 15 If the parties do not face the issue, then the prevailing party must move for attorney's fees within ten days after judgment. The parties may face the issue by agreeing on the fee, if any, submitting the question to the court contemporaneous with the submission of the consent decree, or agreeing to partial judgment on the decree and reserving the questions of fees. This last alternative allows the court to retain jurisidiction on the question of fees while entering final judgment on the remainder of the action.

The parties and the courts have much to gain by settling all of an action at one time. Attorney's fees must be faced at some time. It is impossible to ignore attorney's fees in settlement negotiations on the merits of an action. Attorney's fees can be substantial, often over hundreds of thousands of dollars. A.13

The possibility of an award of attorney's fees in cases similar to this action may be the main criterion in a defendant's decision whether or not to continue to litigate. Often, civil rights actions are brought to force a change of policy in governmental programs. State defendants, in particular, while vehemently denying that they are constitutionally mandated to make such a change, often are quite willing to adopt or try a new program method because they believe it a wise or humane concept. State defendants are often willing even to consent to a decree ordering such a policy change. However, such defendants are unwilling to, and state treasuries will not allow, consent to decrees in cases where the state defendants might prevail on the merits unless attorney's fees are addressed in the settlement.

The defendant, negotiating settlement in good faith, having no objection to implementing the relief sought, has a right to know what the settlement is going to cost before agreeing to settle. The

decision of the Court of Appeals permits such knowledge yet also provides a safety valve where, for whatever reason, the parties are not able to agree on fees at the same time that they agree on the remainder of the relief sought. By providing a safty valve, the First Circuit effectively resolved the conflict between its decision and the decision of the Third and Ninth Circuits questioning the propriety of negotiating the merits of an action simultaneously with the question of attorney's fees. See Prandini v. National Tea Co. 557, F.2d 1015 (CA 3 1977) and Mendoza v. United States 623 F.2d 1338 (CA 9 1980). The decision is sound, and should not be disturbed.

C. THE COURT'S DECISION ENCOURAGES SETTLEMENT OF THE ENTIRE PROCEEDING AND IS IN THE INTEREST OF JUDICIAL ECONOMY

The Court of Appeals for the First Circuit is in an excellent position to judge the adverse effects of allowing plaintiffs to pursue one statutory cause of action, albeit a cause having two remedies, separately through the courts. The decision below will force all parties in civil rights actions to address themselves to all remedies, thus encouraging total settlement of the action. The decision below will conserve scarce judicial resources.

Requiring parties and the district courts to address the issues of fees will not affect the court'a ability to give prompt and effective relief in civil rights cases. The decision allows the district courts ample flexibility to deal with all issues promptly and justly. For example, the district court, in a proper case, can enter judgment on a part of a case and reserve judgment on the remainder. A. 14, 15

The court's decision promotes judicial economy, and does not prejudice any rights of any parties.

IV. CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: February 17, 1981

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al

By their Attorneys:

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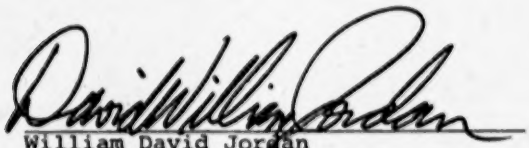
Attorney General



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United States Court of Appeals
For the First Circuit

No. 79-1536

RICHARD H. WHITE,

PLAINTIFF, APPELLEE,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Michael M. Black, with whom *Edward F. Smith* was on brief, for appellant.

Raymond J. Kelly, with whom *Alan Cronheim* was on brief, for appellees.

August 12, 1980

CAMPBELL, *Circuit Judge*. New Hampshire Department of Employment Security (NHDES) appeals from the district court's allowance of plaintiff's post-judgment request for attorney's fees and the court's denial of NHDES' subsequent motion to vacate a previously entered consent decree. As we find the fees request to have been filed too late, we reverse the award.

On March 8, 1976 the plaintiff, Richard M. White, commenced a class action in the United States District Court for the District of New Hampshire challenging NHDES' unemployment compensation procedures. White alleged that delays in the administration of New Hampshire's unemployment compensation program affecting certain groups of

applicants worked a denial of due process and as well were violative of the so-called "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).[1] The complaint alleged jurisdiction under 28 U.S.C. §§ 1343(3), (4) and 42 U.S.C. § 1983; requested class certification under Fed. R. Civ. P. 23; and sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202 and Fed. R. Civ. P. 57. The complaint did not include any request for attorney's fees.

Class certification was obtained on May 11, 1976, with the case proceeding to trial on October 12, 1977. The district court found that NHDES' scheme of administration did indeed violate the "when due" provision of the Social Security Act; the court ordered relief and judgment was entered November 15, 1977. Neither the court's opinion and order nor the judgment made any reference to a possible award of attorney's fees. The judgment was subsequently amended in respects not pertinent to the present appeal, and NHDES, on December 27, 1977, filed a timely notice of appeal.

While its appeal was pending in this court, NHDES requested and received numerous extensions of time for the filing of briefs and designation of an appendix on the ground that the parties were attempting to negotiate a settlement. Finally, on December 11, 1978, upon motion of NHDES, this court ordered the "cause...remanded to the district court for the purpose of entertaining a consent decree." The consent decree was approved by the district court on January 26, 1979, with judgment entered on that day. Neither the consent decree nor the judgment contained mention of attorney's fees. The district court returned, after request, the appeal bond on February 28, 1979; the various exhibits apparently also were returned on or near that date.

[1] The complaint also raised a pendent state claim alleging violations of R.S.A. 282:5-B(2)(d) which regulates certain aspects of New Hampshire unemployment compensation eligibility determination procedures.

On June 7, 1979, some four and one-half months after the district court's approval of the consent decree and its entry of judgment, plaintiffs moved for an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. NHDES objected to this motion contending: 1) that plaintiffs had, during the "original discussions...concerning settlement," indicated that attorney's fees would be waived;[2] 2) that plaintiffs had waited "too long to request attorney's fees...;" 3) that an award of fees would be counterproductive as it would penalize the state despite its good faith settlement efforts; and 4) that plaintiffs were not, under the terms of the consent decree, truly the "prevailing party."

A hearing on the fee request was held, and on August 30, 1979 the district court entered an order granting a fee award in an amount in excess of $16,000. Shortly thereafter, on September 13, 1979, NHDES, over ojection, moved to vacate the consent decree contending that "Plaintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent Decree caught [NHDES] by surprise, as prior to this time, [NHDES] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." The district court, after hearing, in a terse order of October 1, 1979, denied the motion to vacate. NHDES had previously filed on September 28, 1979 a notice of appeal of the district court's award of fees, and on October 30, 1979 it filed a similar

[2] In the fees hearing before the district court, the parties presented different versions of talks they had had concerning attorney's fees prior to their approval of the consent decree which, as already mentioned, was silent on the subject. Plaintiffs contended that they had expected the fees issue to be resolved through negotiation following the entry of judgment while NHDES basically represented that it had expected that the issue of fees would not be pursued. The district court in its opinion awarding fees concluded that attempts to resolve the fees matter at the time of entry of the consent decree "proved nugatory."

notice concerning the court's adverse ruling on its motion to vacate. The appeals were consolidated by this court's order of November 6, 1979.

I.

We dispose of this appeal focusing solely on the question of the timeliness of plaintiff's motion for fees. As we set aside the award because the request was untimely, we do not consider NHDES' alternative contention that, in light of the unexpected award, it should be allowed to withdraw its consent and that the judgment entered pursuant to such consent should therefore be vacated. We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, and that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e); such a motion must, however, be served within 10 days after entry of judgment.[3] Since the present fees request was filed long after expiration of the 10 day period, and since Fed. R. Civ. P. 6(b) prohibits a court from extending the 10 day period, the lower court was without authority to entertain plaintiff's fees request.

Before proceeding to amplify these views we briefly consider plaintiff's threshold argument that since NHDES did not specifically raise the Rule 59(e) argument in the lower court, it is precluded from doing so now. *See Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). The short answer to this objection is that Rule 6(b)'s proscription against the enlargement of the time for serving motions under Rule 59(e) is "mandatory and jurisdictional." *Lapiczak* v. *Zaist*, 451 F.2d

[3]Rule 59(e) provides in its entirety

"Motion to Alter or Amend a Judgment. A Motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

79, 80 (2d Cir. 1971); *see United States* v. *Robinson*, 361 U.S. 220, 229 (1960). Since we hold that a section 1988 fees motion must be made in time to be incorporated in the final judgment, the 10 day period prescribed by Rule 59(e) was in these circumstances the movant's last shot at achieving this result. The district court was thus without jurisdiction over the later application, and the matter of that lack of jurisdiction properly may be first raised at any stage of the proceedings, including the present appeal. *See, e.g.*, Fed. R. Civ. P. 12(b)(3).

II.

Coming to the merits of the timeliness question, our view of the procedural rules applicable to a section 1988 fees request is essentially that set out by Judge Warriner of the Eastern District of Virginia in a comprehensive opinion in *Hirschkop* v. *Snead*, 475 F. Supp. 59 (E.D. Va. 1979). Judge Warriner concluded that "the weight of authority favors the proposition that a motion for attorney's fees under § 1988 must be made within 10 days of entry of final judgment under Rule 59(e)." 475 F. Supp. at 62. The court, in the course of concluding that a final judgment had in fact been entered, rejected the argument that section 1988 fees should be treated as an item of costs governed by Fed. R. Civ. P. 54 and 58, which permit the taxing of costs, without express limit of time, after entry of judgment. The court also rejected the alternative argument that section 1988 fees were somehow so "collateral" to the main litigation as to be eligible for treatment in isolation from the judgment therein.

When the present fees award was appealed, no circuit court had yet spoken on the timeliness issue considered in *Hirschkop*, although there existed a fair amount of circuit and district court authority on the timeliness of motions for attorney's fees made in contexts other than section 1988.[4] Most, though not

[4] *E.g.*, *Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978) (in action for disability pension benefits, Fed. R. Civ. P. 59(e)'s ten-day time limitation bars successful plaintiff's request for attorney's fees filed more than 30 days after the entry of

all, of this authority pointed in the direction taken by the district court in *Hirschkop*. The first decision by a circuit court discussing the timeliness of a section 1988 fee request was handed down soon after appellate argument in the present case; this was the Fifth Circuit's decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), holding, contrary to *Hirschkop*, that attorney's fees under section 1988 were "costs" within Fed. R. Civ. P. 54(b) and 58. As Rule 58 specifically provides that "Entry of judgment shall not be delayed for the taxing of costs," and neither Rule 54(b) nor 58 purports to prescribe any period after judgment within which costs ap-

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judgment) (aff'd on other grounds, although timeliness issue discussed without resolution, 589 F.2d 112 (2d Cir. 1978); *Stacy* v. *Williams*, 50 F.R.D. 52 (N.D. Miss. 1970) (Rule 59(e)'s ten-day limitation bars request for attorney's fees filed more than two months after entry of final judgment; court concluded that it was bound to apply Rule 59 as the fee request concerned "the granting of new substantive relief") (aff'd on the basis of Rule 59(e), 446 F.2d 1366 (5th Cir. 1971)); *DuBuit* v. *Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) (in patent case, "issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment...and not left open pending the outcome of the appeal."); *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979) (in action under Endangered Species Act, request for attorney's fees filed some 28 months after the entry of court's "final order" was barred by Rule 59(e)'s ten-day limitation or alternatively by Rule 60(b)'s one-year limitation on motions for relief from judgment); *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951) (interpreting statute governing award of attorney's fees in patent infringement case to mean "that if an award...is to be made...the [trial] judge should do so either at the time of the entry of judgment or specifically reserve jurisdiction in such judgment to do so. ..."). *Compare Lichtenstein* v. *Lichtenstein*, 55 F.R.D. 535 (E.D. Pa. 1972) (although acknowledging that Rule 59(e) would bar a motion to amend the judgment to include attorney's fees filed after the Rule's ten-day period had expired, the court instead termed plaintiff's request as one to amend the Bill of Costs and allowed it despite timeliness objection) (rev'd on other grounds, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974)). *See also* the so-called common fund cases discussed *infra*.

plications must be filed, the Fifth Circuit, in the absence of any contrary local rule,[5] found no bar to entertaining a fees request filed some two months after the entry of final judgment. Were we to follow the decision in *Knighton*, the present fees request and award would thus likely be timely even though filed some months after entry of final judgment. With all respect, however, we disagree with *Knighton*.

We start from the premise that a final judgment ordinarily signifies the final resolution, subject to appeal, of all claims raised in a lawsuit. *See* Fed. R. Civ. P. 54. New claims may thereafter be advanced and old ones reinstated only pursuant to rules providing, within narrowly defined circumstances, for the reopening of the judgment. *See, e.g.*, Fed. R. Civ. P. 59, 60. If this were not so, appellate tribunals would be constantly vexed by multiple appeals growing out of fragments of the same litigation, and a party could never be sure when his case had ended.[6] It follows that a prevailing party's claim for at-

[5] Although there is no local rule in the District of New Hampshire providing that motions for costs be filed within some specified time after entry of judgment, a number of district courts have adopted such rules. 10 Wright & Miller, Federal Practice and Procedure § 2679 at 240 n.76.

[6] Blackstone adds a bit of historical perspective to the practical considerations underlying the well-settled concept of finality of judgments. He tells how Edward I, "on his return from his French dominions in the seventeenth year of his reign" found it "necessary (or convenient, in order to replenish his exchequer)" to fine rather heavily various judges for "their corruption and other malpractices...." Paramount among these bad habits was the practice of "erasing and altering records," a practice apparently engaged in by "almost all of the king's justices, even the most able and upright." And these punishments were often of a sizeable amount. Sir Ralph Hengham, Chief Justice of the King's Bench is said to have been fined some 7,000 marks, a rather tidy sum considering that the Chief's annual salary was then only 60 marks. The threat of such punishment was clearly not lost on the bench, for as Blackstone relates: "The severity of which proceedings seems to have alarmed the succeeding judges, that through a fear of being said to do wrong,

torney's fees under section 1988 must be resolved before or in the final judgment unless that claim be regarded as falling within some special exception carved out by rule or practice.

Plaintiff urges two such exceptions upon us in support of the view that their failure to request fees prior to the entry of judgment or to move within 10 days to amend such judgment so as to include a fee award, is not fatal to their subsequent fee application. First plaintiff argues, as the Fifth Circuit held in *Knighton*, that section 1988 fees are properly treated as "costs," and thus specifically exempted from the requirement of resolution prior to the entry of final judgment.[7] This position is not without some support in the language of the Fees Act. The Act grants to the district court, in various specified actions, the discretion to "allow the prevailing party, other

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they hesitated at doing what was right. As it was hazardous to alter a record duly made up, even from compassionate motives...they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. ..." 3 Blackstone Commentaries, 409-410.

Thus from Edward's rather severe attempt to fill his coffers and the already traditional view of the solemnity of all judgments "came the ancient common law rule that a judgment, once enrolled on parchment, was unalterable even for the correction of a manifest mistake." *La Vale Plaza, Inc.* v. *R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). Today, rules such as Fed. R. Civ. P. 54, 59 and 60 ease the situation somewhat, but the difficulties that would ensue were individual cases not to be organized around the principle of single and final judgment keep such escape valves the exception, not the rule.

[7]Notwithstanding plaintiff's reliance on the concept that attorney's fees are taxable as Rule 54 costs, plaintiff's motion for an award of attorney's fees was not made as part of a general application for costs; apparently, in fact, no such request for costs has yet been filed by plaintiff.

than the United States, a reasonable attorney's fee *as part of the costs.*" 42 U.S.C. § 1988 (emphasis added). Focusing upon this language, the Fifth Circuit concluded in *Knighton* that, "Because Congress directed that attorney's fees under section 1988 be treated as costs, there is no jurisdictional time limit on the filing of a motion seeking such fees." *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980) (footnote omitted). We are unpersuaded, however, by this analysis.[8]

We do not find it clear that Congress, by generally describing attorney's fees under section 1988 as a part of the costs, meant thereby to include those fees within the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54. Rule 54(d), referring to the awarding of costs, provides, in part, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs... Costs may be taxed by the clerk on one day's notice." 28 U.S.C. § 1920 adds a bit of flesh to the bones of Rule 54(d) by providing:

> "A judge or clerk of any court of the United States may tax as costs the following:

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[8]Apart from the argument based on "costs," *see, infra*, the Fifth Circuit in *Knighton* pointed to little in support of its conclusion that motions for section 1988 fees may be filed after judgment has been entered and the 10 day period for amending or altering such judgment has expired. *See* Fed. R. Civ. P. 59(e). To say, as did that court, that a motion for fees does not change the judgment but merely seeks what is due because of the judgmmnt is to beg the question to be decided. Nor are the cases cited by the Fifth Circuit in *Knighton* compelling. *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991, 994-95 n.3 (D.D.C. 1974), discussed the timeliness of a request for fees in the context of the so-called common fund situation, a situation which has long been distinguished from cases like the present. *See infra*. And, *Environmental Defense Fund, Inc.* v. *Froehlke*, 368 F. Supp. 231, 251-55 (W.D. Mo. 1973), while providing thorough background information on the history of and procedure for the awarding of costs, did not discuss the question of attorney's fees generally, let alone the specific question of the timeliness of a request for such.

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Examination of the above language strongly indicates that the costs allowed as of course by Rule 54(d) and detailed in 28 U.S.C. § 1920 are items of a nature very different from the discretionary attorney's fees allowed under the Fees Act. Rule 54(d) envisages the former as capable of being taxed by the clerk on one day's notice. In keeping with this idea the costs listed in section 1920 are almost all capable of routine computation, and the one arguable exception, item (6), is peculiarly within the court's own authority to establish, without input from the parties and with little likelihood of engendering controversy. Not so the discretionary award of attorney's fees under section 1988. To calculate such an award, indeed, even to determine whether one should be made at all, the district court must evaluate possibly a dozen diverse factors, *see King* v. *Greenblatt*, 560 F.2d 1024, 1026 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), including such factors as the novelty and difficulty of the legal questions presented and the skill required to perform the particular services provided. Moreover, in determining the propriety and size of a fee award, the district court is generally assisted by submissions

from the parties and frequently finds it necessary, as was true here, to hold a hearing on the matter. Appeals often ensue—leading to the prospect of separate fees appeals if final judgment rules are disregarded—as the sizeable sums involved may impose a very substantial and bitterly disputed liability upon the losing party. Hence while such fees, like routine costs, are, to be sure, somewhat ancillary to the main dispute, they are fully capable of engendering a major controverted claim which will be closely intertwined with the merits of the primary dispute and which will require careful factual and legal analysis by the court. The considerations making it feasible to treat routine costs as an exception to final judgment rules—the ease of their computation and the fact that they almost never give rise to dispute or appeal—plainly do not apply to section 1988 attorney's fees. Thus we do not believe that a section 1988 fees award can be likened to the costs assessed routinely after entry of judgment. The potential amount of the fees award, the varied factors which must be considered by the court in reaching the fees decision, and the crucial role of the judge and parties in reaching that final determination render the fees/costs comparison strained at best.

True, as plaintiff points out, the Supreme Court itself, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), citing the language of the Fees Act, characterized attorney's fees under section 1988 as being a part of "costs." But this statement was made in the context of rejecting the contention that the eleventh amendment stood as a bar to the awarding of fees against a state. The Court's general reasoning and ultimate conclusion that "Costs have traditionally been awarded without regard for the state's Eleventh Amendment immunity," *id.* at 695, hardly seems dispositive of the question whether section 1988 attorney's fees fall within the specific types of taxable costs contemplated by Fed. R. Civ. P. 54(d) and 58. *Cf. Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836 (June 23, 1980) (costs that federal courts may impose on lawyers who unreasonably and vexatiously extend court proceedings do not include attorneys' fees under section 1988).

Plaintiff advances a second and alternative argument in support of his position that the resolution of a section 1988 fee request should be treated differently from the general run of controverted issues resolved within the contours of a court's final judgment. He suggests that his "claim for attorney's fees is a collateral and independent claim," and thus not controlled by the time limits which relate solely to the entry of judgment in the central but supposedly separate claim on the merits. Plaintiff would have us view the fee matter as a separate mini-lawsuit to be commenced, argued and resolved at some point in time following the entry of judgment in the central litigation. While plaintiff argues that this position finds support in the cases, the cited decisions involved circumstances of a different sort than those presented here. As discussed by Judge Friendly in *Fase* v. *Seafarers Welfare & Pension Plan*, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978), "cases where attorneys seek, long after judgment, to be paid out of a fund created by the judgment, *Trustees* v. *Greenough*, 105 U.S. 527 (1882), *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), or earmarked assets whose distribution would be governed by the legal principle which plaintiff's attorney had established, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939)...present a lesser problem than those where allowance of a fee will result in an addition to the amount awarded by judgment. Something may also turn on whether...the lawyer is asserting a right of his own...; in the latter type of case it is easier to characterize the proceeding as 'collateral' or 'independent.' " Here we have neither the so-called common fund situation, *see also National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds*, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977), nor an attorney seeking fees by asserting a right of his own rather than one of his client. *See* 42 U.S.C. § 1988 (award of attorney's fees goes to "prevailing party," rather than attorney). *But cf. Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980).

Moreover, plaintiff's contention that a section 1988 fee request is an independent claim that can be maintained after judgment runs squarely counter to the language of the Fees Act itself, which provides that "*In any action or proceeding* to enforce [appropriate civil rights statutes]" the court may, in its discretion, allow reasonable attorney's fees to the prevailing party. (Emphasis added). This language strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action.

We thus remain unpersuaded that a section 1988 fees request falls within some recognized exception—be it "costs" or a theory of independent claim—to the general rule requiring the resolution of controverted issues by a trial judge within the overall framework of the central litigation and the final judgment entered therein. Rather, our review of the relevant authority, *see, e.g.*, note 4, *supra*, including the Fees Act and the well-reasoned *Hirschkop* decision previously discussed, persuades us that the timeliness of a post-judgment motion for attorney's fees made pursuant to section 1988 is properly governed by Rule 59(e)'s ten day limitation.[9] A request for a discretionary award of fees under section 1988 is intimately tied to the questions raised in, and overall merits of, the prevailing party's case, *see King* v. *Greenblatt*, 560 F.2d at 1026-27; it is a request, moreover, that may lead to a sizeable and unpredictable addition to the burdens shouldered by the losing party, *see, e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir. 1980) (affirming fee award of $115,483.75); *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979) (award well in excess of $200,000). The ultimate award of fees is, in our view, clearly a part of the overall relief sought and granted during the course of a particular civil rights action. Not only will it often be more economical of a court's time to resolve fees requests prior to

[9] We need not now address the question whether and in what circumstances the time limits established in other Rules permitting the opening of judgments might apply to a section 1988 fees request.

entry of judgment rather than having them surface for the first time weeks or even months thereafter, but so doing ensures certainty as to the scope and finality of the judgment, *see Fase* v. *Seafarers Welfare & Pension Plan*, 79 F.R.D. 363, 367 (E.D.N.Y. 1978), and at the same time reflects and re-enforces the strong policy against piecemeal appeals. *Wright* v. *Jackson*, 522 F.2d 955, 957 (4th Cir. 1975) (Aldrich, J.).

Indeed, the present case highlights many of the problems which would likely be frequently encountered were we not to endorse the position that Rule 59(e)'s ten day limitation marks, in terms of time, the outer limits of a fees request. The protraction here of a dispute previously, to all appearances, resolved is clearly not an occurrence to be encouraged. A court, having set its hand to the plow on the central litigation, should complete the furrow all at one time. The present post-judgment motion for an award, coming as it did nearly five months after judgment, was in our view too late.

We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, *see, e.g., Ben David* v. *Travisono*, No. 79-1186, slip op. at 6 n.2 (1st Cir. May 16, 1980); the state of the law has surely been such as to suggest the wisdom of that course.

Our decision will not prevent a district court from granting prompt and effective relief in a civil rights case. Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, *see Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980), but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the

means to ensure, when necessary, the appealability of such a judgment. Under Fed. R. Civ. P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibilty. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case.

Nor in a consent decree context do we see anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations. *Cf. Regalado* v. *Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978) (expressing concern over the propriety of injecting the issue of fees into settlement negotiations). Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court; further, they may, of course, decide to waive fees altogether. But there is nothing whatever to be encouraged in the path followed here—leaving the matter of fees unmentioned in the settlement and then raising it unilaterally several months later under circumstances that cast a shadow upon the settlement itself. Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist.

As plaintiff's fees claim was filed out of time, it should not have been entertained, and we hold the district court was without jurisdiction to make any award.

The fees award entered by the district court is vacated.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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RICHARD H. WHITE, PETITIONER

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of March 23, 1981.

QUESTION PRESENTED

Whether a motion for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, must be filed within the ten day period provided under Fed. R. Civ. P. 59(e) for a motion to alter or amend the judgment.

STATEMENT

1. Petitioner, on behalf of himself and a class of similarly situated individuals, filed an action under 42 U.S.C. 1983 on March 8, 1976, alleging that the respondents, New Hampshire Department of Employment Security (hereinafter "the Department") and its Commissioner, violated the due process clause of the Fourteenth Amendment and Section 303(a)(1) of the Social Security Act, as amended, 42 U.S.C. 503(a)(1), by failing to make timely determinations concerning the eligibility of certain claimants for unemployment compensation. The complaint sought both declaratory and injunctive relief.

The action was certified as a class action and, following trial, the district court entered judgment in favor of petitioner and his class, holding that respondents' administrative procedure violated 42 U.S.C. 503(a)(1).[1/] Respondents appealed. While the appeal was pending, however, the parties entered into settlement negotiations. Respondents sought, and were granted by the court of appeals, a remand to the district court "for the purpose of entertaining a consent decree" (Pet. App. A-2). A consent decree was approved and entered by the district court on January 26, 1979 (ibid.). The decree made no mention of attorney's fees, although the question of fees had been discussed during negotiations, including the possibility that counsel might waive attorney's fees (Pet. 3-4, Pet. App. A-18).

On June 7, 1979, petitioner moved for an award of attorney's fees under 42 U.S.C. 1988.[2/] Respondents filed an objection, described by the court of appeals (Pet. App. A-3) as stating four grounds: (1) petitioner had waived attorney's fees during settlement negotiations on the merits, (2) petitioner had waited

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1/ The court, therefore, did not reach the constitutional claim.

2/ The petition states, however, that petitioner's counsel initiated negotiations concerning a fee award five days after the entry of the consent decree (Pet. 4, note 1).

"too long to request attorney's fees * * *,"[3] (3) an award of fees would penalize the state for its good faith in entering into the consent decree, and (4) petitioner and his class were not "prevailing parties" under 42 U.S.C. 1988. The district court, following a hearing, entered an order on August 30, 1979, granting fees in the amount of $16,644.40, approximately $2,000 less than the amount requested by petitioner (Pet. App. A-18, A-25). On September 13, 1979, respondents filed a motion to vacate the entry of the consent decree on the merits on the basis that "[p]laintiff's Motion for Attorney's Fees which was filed almost six months after the entry of the Consent decree caught [the Department] by surprise, as prior to this time, [the Department] had no notice that attorney's fees would be requested and certainly had no notice at all as to the amount of attorney's fees that would be requested." (Pet. App. A-3). The district court denied, without opinion, the motion to vacate (Pet. App. A-16), and respondents filed timely notices of appeal both from that order and from the order granting fees (Pet. App. A-3 to A-4).

2. The court of appeals, which consolidated respondents' appeals, determined that the motion for attorney's fees was not timely because it was not filed within the ten day period provided under Fed. R. Civ. P. 59(e) for a motion to alter or amend the judgment (Pet. App. A-4). It therefore did not reach respondents' contention that the consent decree should be vacated due to the allegedly unexpected award of fees (ibid.).

The court held, first, that the ten day period for motions governed by Rule 59(e) is jurisdictional, citing Fed. R. Civ. P.

3/ Respondents apparently did not specifically argue that Fed. R. Civ. P. 59(e) governed the time for filing the attorney's fees motion.

6(b),[4] and, thus, that respondents' failure to raise that argument in the district court did not preclude its argument on appeal. Stressing the need for finality of litigation, the court concluded that the opportunity for asserting new claims or reinstating old ones after entry of final judgment must be narrowly circumscribed (Pet. App. A-7 to A-8). The court then addressed and rejected the arguments raised by petitioner in support of his contention that a motion for an award of fees under 42 U.S.C. 1988 is not governed by the ten day limit on motions to amend or alter the judgment under Rule 59(e).

Petitioner argued that because 42 U.S.C. 1988 provides that attorney's fees may be awarded "as part of the costs" and costs are governed by Fed. R. Civ. P. 54 and 58, which contain no time limits, there is no time limit for filing a motion seeking fees. This argument was adopted by the Fifth Circuit in Knighton v. Watkins, 616 F.2d 795, 797-798 (1980), in an opinion handed down subsequent to oral argument in the court of appeals in this case. The First Circuit rejected the analysis of the court in Knighton, relying instead upon the decision of the district court in Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979). The court held that, regardless of Congress' reference to fees under Section 1988 as costs, attorney's fees, unlike most of the items enumerated in 28 U.S.C. 1920 as costs to be awarded "as of course" under Fed. R. Civ. P. 54(d), are not capable of routine calculation and are likely to engender controversy which may lead to appeal. Thus, it reasoned that despite the explicit language

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4/ Fed. R. Civ. P. 6(b) provides, in pertinent part, that a district court:

> May not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 59(e) provides no conditions under which the time for filing a motion could be enlarged.

of the statute, attorney's fees under Section 1988 cannot be treated like costs for the purpose of determining when they must be sought. In so ruling, the court recognized that this Court referred in Hutto v. Finney, 437 U.S. 678 (1978), to attorney's fees awarded under Section 1988 as costs, but concluded that those references were made in a context so distinct as not to be dispositive of the issue presented here.5/

The court also rejected petitioner's argument that the claim for attorney's fees is a collateral and independent claim that is not subject to time limits related to the original judgment on the merits. The court concluded that an attorney's fee claim can only be considered collateral or independent where an attorney is seeking to assert a right of his own rather than that of his client or, as in this Court's decision in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), where there is a common fund created by the original judgment that is used to pay the fees, instead of an additional award over and above the judgment (Pet. App. A-12). The court also relied upon the language of Section 1988, which provides that the court may allow attorney's fees "[i]n any action or proceeding" to enforce certain civil rights statutes, as negating the theory that the fees claim is collateral and independent (Pet. App. A-13).

DISCUSSION

The decision of the court below is in conflict with the decsions of the Fifth Circuit in Knighton v. Watkins, 616 F.2d 795 (1980), the Seventh Circuit in Bond v. Stanton, 630 F.2d 1231 (1980), and the Sixth Circuit in Jonnson v. Snyder, 639 F.2d 316 (1981), which have rejected the contention that a motion for

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5/ The court also noted this Court's decision in Roadway Express, Inc. v. Piper, No. 79-701 (June 23, 1980), that attorney's fees are not a part of the costs that may be taxed under 28 U.S.C. 1927 against an attorney who unreasonably and vexatiously increases the costs of litigation.

attorney's fees under 42 U.S.C. 1988 must be made within the ten day period provided under Rule 59(e) for a motion to alter or amend the judgment.[6] The Tenth Circuit, on the other hand, has indicated its agreement with holding of the court below, Gurule v. Wilson, 635 F.2d 782, 787-788 (1980).[7]

The question presented is of considerable importance to civil rights litigants and is one that should be resolved by this Court in order to insure that a uniform rule is applied throughout the federal court system.

1. In cases outside the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, several courts have held that the question of attorney's fees should be resolved either prior to or at the time of entry of the judgment on the merits or, at the latest, within the ten days provided by Rule 59(e), except in certain specifically defined circumstances.[8] Fase v. Seafarers Welfare and Pension Plan, 432 F. Supp. 1037 (E.D. N.Y. 1978), aff'd on other grounds, 589 F.2d 112 (2d Cir. 1978) (timeliness issue discussed at 114-115, note 3); Stacy v. Williams, 446 F.2d 1366 (5th Cir. 1971); DuBuit v. Harwell Enterprises, Inc., 540 F.2d 690 (4th Cir. 1976). An award of costs in a district court, on the other hand, is made

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6/ The decision of the Fourth Circuit in Fox v. Parker, 626 F.2d 351 (1980), while not addressing the issue directly, suggests, at page 353, note 2, that the court would follow the majority position rather than that of the court below.

7/ The issue in Gurule was whether a timely appeal from the award of attorney's fees under Section 1988, rather than from the earlier judgment on the merits, was sufficient to bring the merits to the court of appeals. The court concluded it was, on the theory that the judgment on the merits was interlocutory, because no full relief had been awarded until the district court passed on the request for attorney's fees. Although the court in Gurule noted that plaintiffs there had included a demand for attorney's fees in their complaint (petitioners here did not), it also stated that its decision "accords with" the decision in the instant case (635 F.2d at 788).

8/ The major exceptional circumstance arises when the fee is to be paid out of a fund created by the litigation, Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). See Pet. App. A-5 note 4; A-12.

after judgment, Fed. R. Civ. P. 58, and is subject to no time limitations, Fed. R. Civ. P. 54(d). The question in this case is whether, by specifying that attorney's fees under Section 1988 are to be awarded as part of the costs, Congress intended such an award to be treated as costs for purposes of determining when they must be sought.

The courts of appeals have split on that question. The court below concluded that simply because Congress referred to them as costs, it did not intend that they be treated as costs for all purposes nor to abrogate the general rule that fees must be sought within the time provided by Rule 59(e). It relied upon the language in Section 1988 that fees may be sought "in any action or proceeding" as evidence that they should be settled by the original judgment or by motion to alter or amend it. The Fifth Circuit, on the other hand, instead emphasized the language in Section 1988 referring to fees as costs. See Knighton v. Watkins, supra, 616 F.2d at 797. The court in Knighton also noted that under Section 1988 fees may be awarded only to prevailing parties, and reasoned that entitlement to Section 1988 fees first arises after the conclusion of the litigation on the merits. Since the prevailing party seeks only "what is due because of the judgment," he is not attempting to alter or amend the judgment (ibid.). The court accordingly concluded that a motion for fees under Section 1988 is not governed by the time limitation of Rule 59(e).

2. Our review of the legislative history of Section 1988 does not reveal any discussion of the question of the timing of the request for fees or any explanation of why the statute provides that the fees are to be awarded "as part of the costs." This is not surprising, however, in light of the fact that Congress was aware of at least sixteen other statutory provisions in existence at the time of passage of Section 1988

that contained the identical language.[9] Congress was also aware that there were approximately 90 federal statutory provisions providing in similar terms for an award of attorney's fees.[10] The fee provisions are phrased in a wide variety of ways; some state that costs and expenses including attorney's fees are to be allowed[11] while some allow costs and or together with such fees,[12] and others simply state that reasonable attorney's fees are to be allowed[13] or specify a fund from which such fees are to be paid.[14]

We do not believe that the particular wording of the fee provision is of substantial assistance in determining the timeliness of a motion for fees. In Roadway Express, Inc., v. Piper, No. 79-701 (June 23, 1980), this Court rejected the

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9/ These sixteen are listed as Appendix E to the legislative history of Section 1988 prepared in 1976 by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee (Civil Rights Attorney's Fees Awards Act of 1976 (Public Law 94-559, S.2278) Source Book: Legislative History, Texts, And Other Documents, 94th Cong., 2d Sess). They are 7 U.S.C. 210(f) (Packers and Stockyards Act); 7 U.S.C. 499g(b), 499g(c) (Perishable Agricultural Commodities Act); 7 U.S.C. 2305(a), 2305(c) (Agricultural Unfair Trade Practices Act); 17 U.S.C. 505 (Copyright Act); 20 U.S.C. 1617 (Education Amendments of 1972); 42 U.S.C. 19731(e) (Voting Rights Act Amendments of 1975); 42 U.S.C. 2000a-3(b) (Title II, Civil Rights Act of 1964); 42 U.S.C. 20003-5(k) (Title VII, Civil Rights Act of 1964); 45 U.S.C. 153(p) (Railway Labor Act); 47 U.S.C. 206, 47 U.S.C. 407 (Communications Act of 1934); 49 U.S.C. 8, 49 U.S.C. 16(2), 49 U.S.C. 908(b), 908(e) (Interstate Commerce Act).

10/ These were also contained in legislative history referred to in note 9 supra.

11/ See, e.g., 15 U.S.C. 15c(a)(2) (Antitrust Parens Patriae Act); 15 U.S.C. 2059(e)(4) (Consumer Product Safety Act); 30 U.S.C. 938(c) (Coal Mine Safety Act). Cf. 5 U.S.C. 552(a)(4)(e) (Freedom of Information Act; "reasonable attorney fees and other litigation costs").

12/ See, e.g., 15 U.S.C. 1691e(d) (Equal Credit Opportunity Act); 15 U.S.C. 1918(a) (Motor Vehicle Information and Cost Savings Act); 42 U.S.C. 3612(c) (Fair Housing Act of 1968).

13/ See e.g., 7 U.S.C. 2565 (Plant Variety Act); 15 U.S.C. 117 (Trademark Act); 35 U.S.C. 285 (Patent Infringement Act).

14/ See, e.g., 22 U.S.C. 277d-21 (Mexican-American Chamizal Convention Act of 1964); 22 U.S.C. 1623(f) (International Claims Settlement Act); 29 U.S.C. 501(b) (Labor-Management Reporting and Disclosure Act of 1959).

"superficially appealing argument" that civil rights statutes allowing the award of attorney's fees "as part of the costs" of litigation required that such fees be treated as costs under 28 U.S.C. 1927 (slip op. 5). Instead, the Court considered the purposes of the statutory provisions involved, and the practical results of accepting the purely semantic argument (slip op. 8-10). A similar approach is appropriate here.15/

3. The general rule that motions for the award of attorney's fees are governed by the time limits of Rule 59(e) is justified by the fact that, as the court below recognized (Pet. App. A-13, A-14), there are sound practical reasons for requiring such motions to be submitted promptly. The party against whom fees are to be awarded should know the outside limit of his liability within a reasonable time after judgment is entered against him.16/ Moreover, since disagreements over fee awards often lead to appeals, considerations of judicial economy suggest that an appeal from an order granting or denying an award of fees should be considered along with any appeal on the merits. These factors counsel some time limitation for a fees motion; neither party points to any limitation other than that provided by Rule 59(e), and we are aware of none.17/

Petitioner has suggested no persuasive reason why this general principle should not be applied to cases that arise under statutes providing for the recovery of attorney's fees as part of

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15/ This Court's language in Hutto v. Finney, supra, which merely reflected the wording of the fee provision in Section 1988, is not inconsistent with this approach; that case is of no significant assistance in analyzing the issue presented by the instant petition.

16/ It would, in any event, be open to the party against whom a fee award is sought to raise a defense of laches.

17/ It may well be that an amendment of the Federal Rules of Civil Procedure to provide expressly for such a time limitation would be appropriate. Any such amendment would, of course, operate prospectively, and thus provide affected parties with ample notice of the applicable time limits.

costs. The time the prevailing party needs in order to calculate its fee should not be significantly greater in those situations,[18] nor should settlements be discouraged. On the contrary, when there is an express statutory provision for the recovery of attorney's fees, the negotiating parties will ordinarily be particularly aware that such fees are an element that must be negotiated before the matter can be finally resolved. As the court below observed (Pet. App. A-15): "Failure to confront the fees issue merely muddies the waters, as the present case well demonstrates. * * * Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist."

4. We do not, however, read the court of appeals opinion as requiring that the amount of the fee must be determined, or even considered, in the course of settlement negotiations on the merits.[19] We agree with petitioner (Pet. 18-23) that such a requirement raises troublesome ethical problems. Since the fee award is often the only remuneration counsel for a class of plaintiffs in a civil rights action can expect to receive, and in any event is likely to have at least some effect on counsel's remuneration, the attorney may have an interest adverse to his client if the question of the size of his fees becomes part of the settlement negotiations, see Prandini v. National Tea Co., 557 F.2d 1015, 1020-1021 (3d Cir. 1977); Mendoza v. United

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18/ If the 10 day limitation is unreasonably short in a particular situation, the district court can provide for more time by entering a judgment that expressly reserves the matter of fees. See Pet. App. A-14 to A-15.

19/ In cases in which the parties cannot agree on a settlement, it will ordinarily be necessary to await the judgment to determine which side is entitled to attorney's fees. In that situation, it is clearly impractical to require that the size of the fee must be determined at the time of the judgment.

States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980).20/ Thus, detailed fee discussions should ordinarily be conducted after agreement on the merits has been reached.

5. We are not particularly qualified to discuss the various purely practical problems that confront private attorneys in attempting to negotiate settlement agreements in this context, so there may well be other considerations that should be evaluated in balancing the competing interests involved. At all events, there should be a uniform rule among the circuits governing the timeliness of motions for fees. This Court should therefore enunciate that rule after full briefing and argument of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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20/ For the same reason, it is undesirable to encourage defendants in class suits to make an offer in settlement of a specific sum, to be divided among the class members and counsel as they see fit. It should be clear that plaintiffs' counsel can legitimately refuse such offers.

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IN THE

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OCTOBER TERM, 1980

RICHARD H. WHITE, *Petitioner,*

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

This case concerns the timeliness of a request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended [the "Fees Act"]. The questions presented are:

I. Whether a request for attorney's fees under the Fees Act which defines fees "as part of the costs" is a Fed. R. Civ. P. Rule 59(e) motion to alter or amend a judgment, or instead is procedurally subject to Rules 54(d) and 58 or is to be determined in an independent proceeding supplemental to the proceedings on the merits?

II. Whether a court may require counsel to negotiate a fee award concurrently with negotiations directed at settling the merits of a case despite the ethical conflict that such an obligation imposes on class counsel?

LIST OF THE PARTIES

The petitioner, the plaintiff-appellee below, is RICHARD H. WHITE, a resident of New Hampshire. He is the class representative in this certified class action.

The respondents, the defendants-appellants below, are the NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, and its Commissioner, BENJAMIN C. ADAMS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5887

RICHARD H. WHITE, *Petitioner,*

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The decision of the U.S. Court of Appeals for the First Circuit, entered on August 12, 1980, is reported at 629 F.2d 697 (1st Cir. 1980). A copy of the decision is set forth in the Joint Appendix at J.A. 92-107.

The unreported decision of the U.S. District Court for the District of New Hampshire awarding fees to petitioner, entered on August 30, 1979, is set forth at J.A. 74-80. The unreported order of the District Court denying respondents' motion to vacate the consent decree, which was entered on October 1, 1979, is set forth at J.A. 91.

JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on August 12, 1980. On November 10, 1980, Justice Brennan signed an order extending the time for filing a petition for a writ of certiorari to and including December 10, 1980. A petition was filed on that date, and certiorari was

granted by this Court on May 18, 1981. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The federal statute involved in this case is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended. This case also involves Rules 54(b), 54(d), 58, and 59(e) of the Fed. R. Civ. P.

The statute and rules are set forth verbatim in a separate Appendix at the end of this Brief.

STATEMENT OF THE CASE

The substantive merits of this case were subject to a judgment entered in petitioner's favor on November 15, 1977, J.A. 17-26, and ultimately were resolved in a consent decree approved by the trial court on January 26, 1979, J.A. 31-32. The issues presented here arise from the subsequently filed request for attorney's fees made by petitioner's counsel under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended [hereinafter the "Fees Act" or "§ 1988"], J.A. 34-45, from the trial court's award of fees to petitioner's counsel, J.A. 74-80, and from the First Circuit's reversal of that award, J.A. 92-107.

This action was commenced in March, 1976, when petitioner, proceeding in forma pauperis and represented by counsel from New Hampshire Legal Assistance, filed a complaint alleging that respondents' procedures for processing unemployment compensation claims violated the due process clause of the Fourteenth Amendment and also violated the "when due" provision of the Social Security Act, 42 U.S.C. § 503(a)(1). J.A. 5-16. Petitioner's complaint was filed under 42 U.S.C. § 1983. J.A. 6. Jurisdiction was conferred on the district court by 28 U.S.C. § 1343(3) & (4). *Id.*

On May 11, 1976, petitioner's action was certified as a class action. J.A. 1-2, 93. Following extensive discovery and a two-day bench trial in the fall of 1977, the district court entered a

judgment on November 15, 1977 in favor of petitioner and his class, holding that respondents' administrative procedures were in violation of the "when due" provision of the Social Security Act. J.A. 17-26, 93. Because of its disposition of the statutory issue in favor of petitioner, the trial court declined to address petitioner's constitutional claim. J.A. 25.

Respondents' thereafter filed an appeal from the trial court's decision on the merits. J.A. 3, 93. While the appeal was pending, counsel for petitioner and his class and counsel for respondents initiated settlement negotiations. J.A. 62-63, 93. In response to a motion filed by respondents in the court of appeals, J.A. 29, the case was remanded "for the purpose of entertaining a consent decree," J.A. 30. During the ensuing negotiations, an attempt initially was made by respondents' counsel to settle the matter of fees along with the merits, and even to have petitioner's counsel waive attorney's fees. J.A. 75, 83-84. But, as the district court later found, "[t]hese attempts proved nugatory and finally without any mention of attorneys' fees and costs a Consent Decree was filed and approved [by the court] on January 26, 1979." J.A. 75.

Five days after the entry of the consent decree, petitioner's counsel wrote to respondents' counsel in an attempt to reach a settlement on the award of attorney's fees. J.A. 45, 84. When these settlement negotiations ultimately proved to be unsuccessful, petitioner's counsel on June 7, 1979 moved for an award of attorney's fees under the Fees Act. J.A. 34-45. Respondents' counsel objected, J.A. 46-47, and a hearing was held on August 21, 1979, J.A. 56-73. At that hearing, respondents' counsel argued that petitioner was not truly the prevailing party, J.A. 76, 94, and that the hourly rates used by petitioner's counsel in computing the fee request were too high, J.A. 71. He also contended that he had expected that the fee request would not be pursued. J.A. 68-69.

Although respondents' counsel thus argued that he had not expected the fee claim to be pursued after the entry of the consent decree on the merits, he also candidly conceded at the

fee hearing that he came to the view during the negotiations on the merits that it would have been unethical to "hold a class action hostage or consent decree hostage for a waiver of attorneys' fees." J.A. 69.[1] Counsel for respondents repeated this point at a later hearing, stating that "at the time I felt there was an ethical problem in discussion of the attorneys' fees." J.A. 88.[2]

---

[1] Although the court of appeals' decision in this case does not reflect counsel's admission, counsel did rather fully discuss the ethical conflicts in the trial court. These conflicts were first described by respondents' counsel at the fees hearing held on August 21, 1979:

> "[P]art of the problem [of] including the attorneys' fees and the consent decree was that, in a seminar that was held, it seemed to be the concensus of those present [that] you could not hold a class action hostage or consent decree hostage for a waiver of attorneys' fees.
>
> "Now, I haven't seen anything lately on that, but it became my opinion, and I was warned by my brother counsel in my office, I should not be holding the consent action hostage to attorneys' fees because I might have an ethical problem and it should not be included in the consent decree. That was his opinion. He had been through the course, and I took his opinion." J.A. 69.

[2] This statement occurred at the hearing held on October 1, 1979, to consider respondents' motion to vacate the consent decree, where counsel for the respondents again volunteered to discuss the ethical problem:

> "I would add, Your Honor, again, I may be repeating myself from the last time we were here on the question of attorneys' fees, at that time I felt there was an ethical problem in discussion of the attorneys' fees, at least towards the end when the consent decree was finally signed. [W]hat I have read and what is being held is, if the attorneys' fees are going to a nonprofit corporation, rather than to the plaintiffs, that it's wrong to hold the attorneys' fees hostage to consent decree because the Court's order goes to the plaintiff. And however the attorneys' fees go to the attorneys directly. [A]nd unlike other cases, if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here. And that's all I want to say." J.A. 88.

Subsequent to the submissions by counsel and the arguments and admissions at the fee hearing, the district court on August 30, 1979 overruled the objections raised by respondents' counsel to the fee request by petitioner's counsel, and awarded "[r]easonable attorney's fees in the sum of $16,644.40 . . . to [petitioner's] counsel." J.A. 80.

On September 13, 1979, respondents filed a motion to vacate the consent decree, contending in part that the fee request by petitioner's counsel had caught respondents "by surprise." J.A. 81-82. After a hearing at which respondents' counsel again admitted the ethical problems surrounding concurrent consideration of fees and of the merits, see n.2 *supra*, the court rejected respondents' motion in a one-page order. J.A. 91, 95. Respondents then perfected their appeals both from the award of fees and from the denial of the motion to vacate, J.A. 95, and the appeals were consolidated, *id.*

On their appeal to the First Circuit, respondents argued for the first time that the fee request filed under the Fees Act by petitioner's counsel actually had been a motion to alter or amend judgment, and that it thus was time-barred by the 10-day limitation in Rule 59(e) of the Fed. R. Civ. P. J.A. 96. The First Circuit agreed, and thereby reversed the trial court's fee award. J.A. 92-107.

In order to apply Rule 59(e) to petitioner's fee request, the First Circuit characterized a fee award as an integral part of the substantive judgment on the merits, which in this instance was obtained through a consent decree: "We hold that a fees award under 42 U.S.C. § 1988 is a matter to be raised and determined prior to entry of final judgment, *and* that, at the latest, a fees request may be presented after judgment only within such time limits as apply to an appropriate motion to reopen the judgment. Here the proper post-judgment motion was one to alter or amend judgment under Fed. R. Civ. P. 59(e)." J.A. 95 (emphasis added).

In applying Rule 59(e) to a fee request, the First Circuit explicitly rejected the statutory definition of fees in the Fees Act

"as part of the costs." J.A. 100-103. The court of appeals also held that, even if not a part of the costs, a fee award under the statute is not sufficiently separate and independent from the merits to be considered in an independent proceeding apart from and subsequent to the proceedings on the merits. J.A. 103-104.

The First Circuit also ruled that, even in cases that are being settled by agreement of the parties, the issue of fees should be negotiated simultaneously with the issues on the merits: "Nor in a consent decree context do we see anything wrong with *requiring* the parties to face up to the issue of fees in their settlement negotiations." J.A. 106 (emphasis added). Perceiving no ethical conflicts flowing from this requirement, the First Circuit added that it did not necessarily "suggest that an attorney in the course of settlement negotiations need, or in every case may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree." J.A. 107.

Because of the First Circuit's erroneous application of Rule 59(e) to a request for attorney's fees, counsel for petitioner filed a petition for a writ of certiorari with this Court on December 10, 1980. The petition was granted on May 18, 1981. J.A. 108.

SUMMARY OF ARGUMENT

The issues in this case, involving the timeliness of a request for attorney's fees, leave little room for dispute. Not only does the Fees Act define fees "as part of the costs," but this Court forty years ago in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 170 (1939), held that fees were so separate from the merits that they were to be determined in "an independent proceeding supplemental to the original proceeding." The propriety of this procedure was confirmed in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), where this Court held that it would have been wrong for the trial court to delay consideration and implementation of a judgment on the merits in order to address the separate matter of fees.

1. By applying Rule 59(e) of the Fed. R. Civ. P. — which governs motions to alter or amend a judgment — to a request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, the First Circuit below erred in three respects. It disputed Congress' definition of fees "as part of the costs," a definition that cannot be viewed as mere surplusage. Second, it disregarded entirely this Court's holding in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 170 (1939), that a request for fees is "not a request for a modification of the original decree," and hence cannot be subject to a 10-day rule. Finally, and most basically, it lifted Rule 59(e) entirely out of its intended context of allowing courts to reconsider matters previously before them so as to be able to correct errors of law. In fact, through its failure to examine both the intent and the usual application of Rule 59(e), the First Circuit became the only court of appeals to apply Rule 59(e) to a request for fees under the Fees Act.

a. In enacting the Fees Act, Congress defined fees "as part of the costs." These are not empty words. In *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court held that Congress' chosen definition of fees as part of the costs was sufficient to abrogate the Eleventh Amendment immunity claimed by the state defendants there from an award of fees. Based on the recognition that the Fees Act represented "Congress' decision to authorize an award of attorney's fees as an item of costs," 437 U.S. at 696, three courts of appeals have now held that the cost item of fees is, like other items of costs, subject only to Rules 54(d) and 58, rules which govern costs generally and which impose no strict time limits on requests therefor. These courts of appeals' decisions are surely correct. Fees, like other items of costs, are usually awarded to counsel after judgment. In fact, the only ways that fees differ from other items of costs arise from clarifications that Congress itself had to make in view of its definition that fees were part of the costs, *i.e.*, Congress in enacting the Fees Act specified that the cost item of fees would be awarded by the courts, and would be awarded under the dual standard which distinguishes prevailing plaintiffs from prevailing defendants. Congress' defini-

tion cannot be avoided. Just as the words "or proceeding" cannot be read out of an analogous fee-shifting statute, see *New York Gaslight Club, Inc.* v. *Carey*, 477 U.S. 54 (1980), the words "as part of the costs" cannot be read out of the Fees Act.

b. Just as fee requests under the Fees Act are not subject to a 10-day time limit under Rules 54(d) and 58, fee requests in general cannot be subjected to a 10-day time limit under this Court's decision in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). At issue in *Sprague* was the timeliness of a fee request filed several years after judgment. Reaching its decision under the then-applicable timeliness rules of equity — the predecessors of Rules 59 and 60 of the Fed. R. Civ. P. — the Court reversed the First Circuit and held that since a request for fees involves "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals — that it came after the end of the term at which the main decree was entered and therefore too late — falls." 307 U.S. at 170. The truly independent and supplemental nature of a fee determination is illustrated by the fact that fee awards ordinarily are destined for counsel, by the fact that there is an entire body of law governing the manner in which fees are to be computed, and by the fact that fee determinations often require evidentiary hearings. As Justice Frankfurter wrote for the Court in *Sprague*, "the inquiry [is] a collateral one, having a distinct and independent character." 307 U.S. at 169.

c. The origin and intended use of Rule 59(e) belie the rule's application to a request for fees. The Advisory Committee Report, addressing the adoption of Rule 59(e), states that subdivision (e) "has been added to care for a situation such as that arising in *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A. 8th, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." 5 F.R.D. 433, 476 (1946). The situation that arose in *Boaz* was "the absence of express authority [for a trial court] to correct its errors," specifically

the error of dismissing a case without prejudice rather than with prejudice. 146 F.2d at 322. The power asserted in *Boaz* was the trial court's "inherent power to correct its error," specifically to change the dismissal to one with prejudice. *Id.* Although the Eighth Circuit in *Boaz* affirmed the power of the trial court "to reconsider and correct the action taken," *id.*, there still was no rule authorizing trial courts to reconsider and correct their errors. That authorization was provided by Rule 59(e). Subsequent to its adoption, Rule 59(e) has consistently been used with regard to motions for rehearing or for reconsideration of matters previously presented to a court on which the court allegedly erred as a matter of law. See generally *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978); *United States* v. *Dieter*, 429 U.S. 6 (1976). Given the background and ordinary application of Rule 59(e), it cannot be applied to a request for attorney's fees which seeks no reconsideration of the merits, which merely seeks what is due because of the judgment on the merits, and which involves an independent proceeding supplemental to the original proceeding.

2. In the course of erroneously applying its 10-day time limit to the filing of fee requests, the First Circuit committed yet another error by holding that there was nothing wrong with requiring simultaneous negotiation of the merits and of fees. What is wrong with this decision is the ethical dilemma that it imposes on class counsel who have an interest of their own in any fee award. Because of this ethical problem, the Third Circuit has followed a wiser course by requiring its trial courts to insist on settlement of the merits separate from any subsequent discussion about fees. *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977); see also *Mendoza* v. *United States*, 623 F.2d 1338, 1352-1353 (9th Cir. 1980). The First Circuit's decision not only imposes an unwarranted unethical dilemma on counsel, but also runs afoul of this Court's admonition in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), that it would be wrong for trial courts to delay the implementation of a remedy on the merits "in order to resolve the question of fees simultaneously."

ARGUMENT

I. A Request For Attorney's Fees "As Part Of The Costs" Is Subject To Rules 54(d) And 58 Of The Fed. R. Civ. P. And Is Properly Determined In An Independent Proceeding Supplemental To The Proceedings On The Merits

Rule 59(e) was intended to apply and has commonly been applied to a motion which seeks reconsideration of a judgment with regard to matters previously submitted so as to permit a court to alter or amend its allegedly erroneous ruling. Thus, even regardless of the law which does govern the timeliness of fee requests, Rule 59(e) cannot and does not apply to a request for attorney's fees. Here, however, there is other law — established by this Court which has held that fees are to be determined in an independent proceeding supplemental to the proceedings on the merits; and established by Congress which has defined fees as part of the costs.

A. Since Congress Authorized Attorney's Fees "As Part Of The Costs" When It Amended 42 U.S.C. § 1988, Fee Requests Are Governed By Rules 54(d) And 58 Of The Fed. R. Civ. P. Which Address Costs And Which Contain No Strict Time Limitations.

When Congress amended 42 U.S.C. § 1988 by enacting the Fees Act, Congress expressly authorized attorney's fees to be awarded and collected "as part of the costs." Although this language is unequivocal on its face, the point was reiterated in the legislative history accompanying the Fees Act specifically with regard to government defendants: quite simply, governments are to be assessed "attorneys' fees, like other items of costs." S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976) (footnote omitted).[3]

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[3] The omitted footnote contains a single yet significant citation: *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927). See S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 n.6 (1976). *Fairmont Creamery*, which involved the assessment of *costs*, is discussed extensively in *Hutto* v. *Finney*, 437 U.S. 678, 694-698 (1978).

Relying heavily upon Congress' chosen language, this Court in *Hutto* v. *Finney*, 437 U.S. 678 (1978), held that the definition of fees as an item of costs was sufficient to override the states' Eleventh Amendment immunity from monetary liability. Not only did the Court in *Hutto* extensively distinguish "liability for prelitigation conduct" from the "expenses incurred in litigation," 437 U.S. at 695,[4] but the Court thoroughly recognized that Congress in 1976 of course had been free to "amend its definition of taxable costs." 437 U.S. at 696. And that is precisely what Congress did. Enacting the Fees Act represented "Congress' decision to authorize an award of attorney's fees as an item of costs." 437 U.S. at 697.

In view of the express language of the Fees Act, and based on this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978), three courts of appeals have now held that requests for fees as an item of costs are subject to the procedural rules governing costs, Rules 54(d) and 58 of the Fed. R. Civ. P.[5]

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[4] Distinguishing between monetary liability for prelitigation conduct, on one hand, and expenses of litigation, on the other, this Court in *Hutto* v. *Finney*, 437 U.S. 678 (1978), repeatedly referred to fees as a part of the costs and to fees as incidental and ancillary to the relief on the merits. This extended discussion in *Hutto* was quoted at length by the Court in *Maher* v. *Gagne*, 448, U.S. 122, 131-132 n.14 (1980), a case in which a request for fees "as part of the costs" under the Fees Act was determined in an independent proceeding subsequent to resolution of the merits through a settlement.

[5] Because of respondents' previous submissions in this case, it needs to be pointed out that the question in this case is *not* whether a statute or rule which authorizes "costs" should be construed to include fees. See, *e.g.*, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980). Quite to the contrary, the statute invoked in this case — the Fees Act — already defines fees "as part of the costs." The question here thus is simply whether a request for fees as an item of costs *under the Fees Act* is governed for procedural purposes by Rules 54(d) and 58, rules which govern the procedural disposition of costs without qualification.

Even if the respondents' submission — which is not presented here — were somehow relevant, the purposes of the Fees Act would

These rules impose no strict time limitations on the filing of fee requests, and, in fact, Rule 58 directs that "[e]ntry of the judgment shall not be delayed for the taxing of costs." The Fifth Circuit initially applied these rules, and rejected the application of Rule 59(e) to a fee request, in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), a decision which was followed in *Jones* v. *Dealers Tractor and Equipment Co.*, 634 F.2d 180 (5th Cir. 1981). The Sixth Circuit agreed in *Johnson* v. *Snyder*, 639 F.2d 316 (6th Cir. 1981), as did the Seventh Circuit in *Bond* v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980).[6]

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have to be considered. For example, in *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), where this Court held that the authorization of "costs" in 28 U.S.C. §1927 could not be interpreted to encompass fees, the Court stressed that a contrary construction would be inconsistent with the remedial purposes of fee-shifting statutes such as the Fees Act. On the other hand, as Justice Powell, the author of the majority opinion in *Roadway Express*, observed in his concurring opinion in *Delta Air Lines, Inc.* v. *August*, 101 S.Ct. 1146, 1156 n.2, 67 L.Ed.2d 287, 300 n.2 (1981), the word "costs" in Rule 68 of the Fed. R. Civ. P. should encompass fees since such a construction is entirely consistent with the purposes of fee-shifting statutes such as the Fees Act.

In the final analysis, however, *Roadway Express* and *Delta Air Lines* are inapposite here since the statute invoked by petitioner — the Fees Act — already defines and authorizes fees "as part of the costs."

[6]This position, rejecting the application of Rule 59(e) to a fee request, was also adopted by the Fifth Circuit in *Van Ooteghem* v. *Gray*, 628 F.2d 488 (5th Cir. 1980), *reh. en banc pending on other grounds*, 640 F.2d 12 (5th Cir.), *premature petition for cert. on other grounds dismissed without prejudice*, 101 U.S. 2031, 68 L.Ed.2d 334 (1981).

This same conclusion has been reached by the trial courts in *Janicki* v. *Pizza*, 501 F.Supp. 312 (N.D.Ohio 1980), and *Anderson* v. *Morris*, 500 F.Supp. 1095 (D.Md. 1980). The only trial court decision disagreeing with this conclusion under the Fees Act, *Hirschkop* v. *Snead*, 475 F.Supp. 59 (E.D.Va. 1979), a decision relied on extensively by the First Circuit in this case, was not ruled upon on appeal, 646 F.2d 149 (4th Cir. 1981).

The correctness of these decisions is established not only by the language of the Fees Act and by this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978), but also by the similarities between fees and other items of costs. Additionally, the fact that Congress clarified the manner in which it wanted the cost item of fees to be awarded further demonstrates that Congress intended fee awards to be part of the costs.

Undoubtedly the strongest similarity between fees and other items of costs is the timing of their availability: both ordinarily are available only after a resolution on the merits. As the Fifth Circuit observed in its seminal decision in *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980), because attorney's fees "may be awarded only to prevailing parties . . . attorney's fees under section 1988 will ordinarily be sought only after litigation." 616 F.2d at 797. Accordingly, a fee request "is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks *what is due because of the judgment.*" *Id.* (emphasis added).

This judicial recognition that fees ordinarily are available and hence are sought after a resolution on the merits[7] finds explicit support in the legislative history of the Fees Act. The House Report, addressing the stage at which a party may be deemed to have prevailed, expressly distinguished between

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[7]The word "ordinarily" is used in the text because there is one limited exception under which fees and other items of costs may be awarded prior to a final resolution on the merits. Specifically, under the rule established in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974), and in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), fees and other items of costs may be awarded pendente lite incident to the final disposition of interim matters. This rule, along with *Bradley* and *Mills*, were cited with approval in the House and Senate Reports accompanying the Fees Act. See H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 8 (1976); S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976).

termination of the litigation through a consent decree and the subsequent availability of fees:

> "If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker* v. *Matthews*, 411 F.Supp. 1059 (D.D.C. 1976); *Aspira [sic] of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975)." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976).[8]

The same distinction, between termination of the litigation and the subsequent availability of fees, was made in the Senate Report and quoted with approval by this Court in *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980):

> "The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' S.Rep. No. 94-1011, p.5 (1976)."

A second and perhaps even more telling similarity between fees and other items of costs is the fact that they usually are sought by and awarded to, not the parties, but *counsel*. This

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[8] The consent decrees in two of the cases relied on in the House Report, similar to the consent decree here, addressed and resolved the merits of the litigation without any reference to attorney's fees. *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974), *aff'g* 376 F.Supp. 483 (N.D.Ohio 1973); *ASPIRA of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). The consent decree in the third case reserved the fee issue for later resolution by the court. *Parker* v. *Matthews*, 411 F.Supp. 1059 (D.D.C. 1976), *aff'd sub nom., Parker* v. *Califano*, 561 F.2d 320 (D.C.Cir. 1977). In either situation a subsequent award of fees is appropriate.

practice has been repeatedly recognized in the fee decisions rendered by this Court.[9] In fact, consistent with this practice, the fee award made by the trial court in this case was made "to [petitioner's] counsel." J.A. 80.[10]

This practical reality about the direct recipient of the cost item of fees also finds express recognition in the legislative history of the Fees Act. The Senate Report, for example, explicitly states that "*counsel* for prevailing parties *should be paid*, as is traditional with attorneys compensated by a fee paying client, 'for all time reasonably expended on a matter.'" S.Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976) (emphasis added) (citation omitted). In fact, the need for the Fees Act

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[9]See, *e.g.*, *Maher* v. *Gagne*, 448 U.S. 122, 126 (1980) where fees were awarded after settlement on the merits to "respondent's counsel"; *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 70-71 n.9 (1980), where fees were held appropriate across-the-board for "public interest groups"; *Hutto* v. *Finney*, 437 U.S. 678, 693 (1978), where appellate fees were ordered to be paid "to counsel for the prevailing parties."

In antitrust and securities litigation, fees also are paid directly to counsel. See, *e.g.*, *Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

[10]The trial court's award to counsel was also consistent with the First Circuit's repeated recognition of the fact that fee awards are to be paid directly to counsel or to their public interest organizations. See, *e.g.*, *Palmigiano* v. *Garrahy*, 616 F.2d 598 (1st Cir.) *cert. denied*, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980) (ACLU's National Prison Project); *Lund* v. *Affleck* 587 F.2d 75 (1st Cir. 1978) (Rhode Island Legal Services); *Perez* v. *Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978) (Puerto Rico Legal Services); *Reynolds* v. *Coomey*, 567 F.2d 1166 (1st Cir. 1978) (NAACP Legal Defense Fund).

The reason for this practice — in situations in which the prevailing party is represented without fee (as is the case here) or for a nominal fee — is to prevent windfalls to non-fee paying plaintiffs. In accord with this reasoning, the Fifth Circuit more than a decade ago in *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1970), specifically directed "that the fees allowed are to reimburse and com-

was premised on "evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 3 (1976). Designed to remedy this problem by providing a financial incentive to lawyers, the Fees Act was enacted to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." *Id.* at 9.

Aware of the basic characteristics shared by fees and by other items of costs, Congress in two respects clarified the manner in which it wanted the cost item of fees to be awarded.[11] First, although Rule 54(d) states that costs "may be taxed by the clerk," Congress overrode this partial dele-

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pensate for legal services rendered and will not go to the litigants, named or class."

Entirely consistent with this reasoning is the judicial denial of fees to nonlawyer *pro se* litigants on the ground that fee awards were never intended to provide a windfall to parties. See *Cofield* v. *Atlanta*, 648 F.2d 986 (5th Cir. 1981); *Cooker* v. *U.S. Department of Justice*, 632 F.2d 916 (1st Cir. 1980); *Davis* v. *Parratt*, 608 F.2d 717 (8th Cir. 1979); *Hannon* v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976). Fees, however, have been awarded to attorneys who represented themselves as parties. See *Ellis* v. *Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C.Cir. 1977).

Also consistent with this reasoning is the judicial recognition that attorneys themselves have standing to appeal from a denial of fees. *Lipscomb* v. *Wise*, 643 F.2d 319 (5th Cir. 1981); *Dietrich Corp.* v. *King Resources Co.*, 596 F.2d 422 (10th Cir. 1979); *Preston* v. *United States*, 284 F.2d 514 (9th Cir. 1960); *Angoff* v. *Goldfine*, 270 F.2d 185 (1st Cir. 1959).

[11] The clarifications made by Congress in enacting the Fees Act are fully consistent with the costs provision in Rule 54(d), which states at the outset: "Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed. . . ." Fed. R. Civ. P. Rule 54(d).

gation[12] by allowing fees to be awarded only by "the court." Second, although both Rule 54(d) and the Fees Act make items of costs available to the "prevailing party," Congress incorporated into the Fees Act a dual standard under which counsel for prevailing plaintiffs are ordinarily entitled to an award of fees whereas their winning adversaries can be awarded fees only if the litigation was frivolous, unreasonable or without foundation.[13] In other words, Congress simply assured that the fees available "as part of the costs" would be awarded by the courts under the dual standard.

In the final analysis, there simply is no escape from Congress' chosen definition of fees "as part of the costs."[14] Just as

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[12] The delegation to clerks of court — even aside from the effect of the Fees Act — is not exclusive. First, the use of the word "may" in Rule 54(d) indicates that the delegation is discretionary not mandatory; and any award of costs by a clerk in any event is reviewable by "the court." Second, 28 U.S.C. §1920, which itemizes various statutory costs, authorizes the allowance thereof either by a "judge or clerk." Finally, the item of costs listed in 28 U.S.C. §1920(6), the "[c]ompensation of court appointed experts," etc., is peculiarly within the authority of the courts.

[13] That part of the dual standard which makes fees ordinarily available when a plantiff prevails was initially articulated in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and has been followed consistently thereafter, see, *e.g., New York Gaslight Club Inc.* v. *Carey*, 447 U.S. 54, 63, 68 (1980); *Northcross* v. *Board of Education of Memphis*, 412 U.S. 427, 428 (1973). The defendants' side of the dual standard was set forth in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421-422 (1978); see also *Hughes v., Rowe*, 101 S.Ct. 173, 178, 66 L.Ed.2d 163, 172 (1980). There is no question that a similar duel standard was expressly incorporated into the Fees Act. See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 6 (1976); S.Rep. No. 94-1011, 94th Cong., 2d Sess., 4 (1976).

[14] As this Court has repeatedly observed, it is a "well settled rule of statutory construction that all parts of a statute, if at all possible are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973), quoted with approval in *Administrator, FAA* v.

the words "or proceeding" could not be read out of the fee authorization in Title VII, see *New York Gaslight Club Inc.* v. *Carey*, 447 U.S. 54 (1980), the words "as part of the costs" cannot be excised from the Fees Act. Since Congress expressly intended fees to be awarded as part of the costs, fee requests are governed by Rules 54(d) and 58 of the Fed. R. Civ. P., rules which address costs and which contain no strict time limitations.

B. Since Fee Requests Involve Independent Proceedings And Not A Request For A Modification Of A Judgment On The Merits, Fee Requests Are Governed By No Strict Time Limitations

Although Congress' definition of fees as part of the costs is dispositive of the timeliness issue in this case, there is a second and equally compelling reason for reversing the First Circuit's decision in this case. This second reason arises from the fact that a fee request is not a request for a modification of the judgment on the merits, a reality recognized in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), where this Court rejected a timeliness claim identical to that adopted by the First Circuit below.

At issue in *Sprague* was the power of a district court to award attorney's fees as part of the "costs as between solicitor and client," 307 U.S. at 165, 166, 167, 168, 169, where the fee request had been filed several years after entry of the mandates on the merits in the case.[15] In the defendant's view and

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Robertson, 422 U.S. 255, 261 (1975). See also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used").

[15] An initial issue in *Sprague* was whether the prevailing plaintiff who had produced a common benefit but not an identifiable common fund was entitled to an equitable award of fees. Addressing this issue, the Court conceded that the non-class action plaintiff "neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate." 307 U.S. at

in the First Circuit's view, the fee request had been untimely both because fees were not mentioned in the earlier mandates on the merits and because the then-applicable rules of equity allowed a final decree to be amended only by a motion filed during the term of court of its entry. Rejecting these arguments, and reversing the First Circuit, the Court initially explained that the matter of fees "was not directly in issue in the original proceedings," that plaintiff's "failure to ask" for such fees during the proceedings on the merits could not be construed as "an implied waiver," that the availability of fees is "contingent upon the exigencies of equitable litigation," and that in any event "'the inquiry [is] a collateral one, having a distinct and independent character.'" 307 U.S. at 168-169, (footnote and citation omitted). This Court also squarely held that a fee request is not a request for modification of a substantive decree on the merits:

> "Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals — that it came after the end of the term at which the main decree was entered and therefore too late — falls." 307 U.S. at 170.

Although the Court reached this decision under the then-existing rules of equity, the decision would have been the same under Rule 59, for, as the Court noted, the timeliness rules pertaining to terms of court under the rules of equity had been replaced by similar timeliness requirements in Rules 59 and 60 of the new Federal Rules of Civil Procedure. 307 U.S. at 169 n.9. Under either set of rules, as Justice Frankfurter concluded in his opinion for the Court, a fee request is not a motion to alter or amend a judgment. Instead, the inquiry is a collateral one, having a distinct and independent character.

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166. Nonetheless, through "the consequences of *stare decisis*," her litigation did establish claims which might be asserted by other people, and it thus was "for the benefit of others." 307 U.S. at 167. Accordingly, plaintiff was entitled to fees as a matter of equity.

Relying on this Court's decision in *Sprague*, the Eighth Circuit last summer recognized that all fee requests, whatever their bases, are distinct and independent from the merits. As the Eighth Circuit concluded in that case, *Obin* v. *District No. 9 of the Int'l Assn'n of Machinists*, ___ F.2d ___, ___ (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 17), a multicount case where the fee request was based both on Title VII and on the bad faith exception to the American Rule, a uniform adherence to *Sprague* is necessary:

> "From both a policy and a legal standpoint, therefore, a claim for attorney's fees should be treated as a matter collateral to and independent of the merits of the litigation. Accordingly, the timeliness of a claim for fees should be governed by procedural rules that reflect the collateral and independent nature of the claim rather than by rules, such as the ten-day provision of Rule 59(e), that relate to the merits of the action."

In reaching this decision, not only did the court of appeals properly defer to this Court's decision in *Sprague*,[16] but the Eighth Circuit also correctly relied on the distinct and independent character of fee determinations in general. *Cf. Terket* v. *Lund*, 623 F.2d 29, 33 (7th Cir. 1980) (since an "award of attorneys' fees under § 1988 is a decision distinct from the

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[16] Apart from the deference paid by the Eighth Circuit to this Court's decision in *Sprague*, the Eighth Circuit nonetheless was of the view that fee requests should be submitted and determined fairly quickly after the entry of judgment, and even suggested that trial courts should adopt local rules encouraging fee requests to be filed within 21 days of the entry of judgment. *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___, ___ (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 17, 20). Although we do not dispute the need for a uniform procedural approach to fee requests, we submit that the 21-day rule suggested by the Eighth Circuit is short-sighted not only because it raises the same post-judgment problems and imposes the same ethical conflicts caused by the First Circuit's decision in the instant case, see discussion at 33-41, *infra*, but also because it fails to recognize that a fee request is "con-

decision on the merits," a separate "notice of appeal specifying an appeal from the order awarding attorneys' fees is required"). This distinct character, as well as the nature of the independent proceeding necessary to make the fee determination, are readily apparent from the manner in which fees actually are assessed both under fee-shifting statutes and in common fund situations.[17]

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tingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal place such a claim in much better perspective than it would have been at an earlier stage." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 168 (1939).

In our view, the only time limitation that could be applicable to a fee request is a flexible one flowing from the equitable doctrine of laches, a doctrine which would allow a fee request to be denied where the request was unreasonably delayed and where the delay caused prejudice to the defendant. Here, where fee negotiations were initiated by petitioner's counsel five days after the entry of the consent decree and where respondent's counsel fully understood that it would have been unethical to negotiate fees as part of the consent decree, see the Statement of the Case at 3-5 *supra*, there was neither delay nor prejudice, and laches thus is inapplicable.

[17] As is set forth in the text and illustrated through the cases cited in nn. 18-21, *infra*, both the character of fee determinations and the nature of the independent proceedings necessary to make the determinations are virtually identical whatever the basis of the fee request may be, *e.g.*, fee-shifting statute, common fund, bad faith. This is so in part because of the large body of law that has been developed to govern fee determinations in general. It also reflects the fact that fee requests increasingly are made on a variety of grounds. See, *e.g.*, *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___ (8th Cir. June 11, 1981) (No. 80-1315).

Obvious as the foregoing may seem, respondents' previous submissions in this case, suggesting that the decision in *Sprague* should be limited to fee determinations under the common fund theory, deserve at least a short rejoinder here. Most basically, any suggestion that there must be a litigation-created identifiable pool of money from which fees will be paid to counsel for the prevailing plaintiff with no adverse monetary consequences to the losing defendant be-

First, as we pointed out at 13-16, *supra*, fees ordinarily are awarded to counsel after a resolution on the merits where the resolution either produces a prevailing party under a fee-shifting statute or produces a common fund. In other words, the initial determination that there is a prevailing party or some kind of common fund is both prerequisite to, and part and parcel of, the distinct and independent inquiry which must be made into the availability and amount of fees. To be sure, this initial determination flows from the merits of the case,[18] but

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fore *Sprague* may be invoked is a suggestion which widely misses the mark. *Sprague* itself belies such a suggestion, for the plaintiff there "neither purported to sue for a class nor formally established by litigation a fund availble to the class." 307 U.S. at 166. Accordingly, on remand the fees were assessed directly against the defendant bank to the conceded financial detriment of the bank and its unsecured creditors. See 28 F.Supp. 229 (D.Me. 1939), *aff'd*, 110 F.2d 174 (1st Cir. 1940). Indeed, the First Circuit still recognizes that there is no need for there to be an actual common fund in order to award fees under the common fund theory. *Kargman* v. *Sullivan*, 589 F.2d 63 (1st Cir. 1978). Even more compelling is *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970), where the Court held that counsel for plaintiffs were entitled to fees to be paid by defendants under the common fund theory despite the fact "that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid." See also *Hall* v. *Cole*, 412 U.S. 1 (1973); *cf.*, *Boeing co.* v. *Van Gemert*, 444 U.S. 472 (1980) (even where there is an identifiable common fund, fees may be assessed against the unclaimed portions of that fund to the financial detriment of the losing defendant).

Interesting or not, the identity of the financial source nonetheless is beside the point. The fact of the matter is that the entire thrust of the timeliness decision in *Sprague* focuses on the distinct and independent character of a fee determination. Regardless of the basis of a fee request, the nature of the inquiry remains the same: distinct and independent from the rights adjudicated on the merits.

[18] This initial resolution of whether a party has sufficiently prevailed under a fee-shifting statute or has sufficiently produced a common fund, so as to entitle counsel to an award of fees, is governed by a body of law that itself is distinct and independent from the law governing the rights adjudicated on the merits. With regard to this

nothing in a fee request permits reconsideration of, or in any way alters or affects, the rights that have been already adjudicated or otherwise resolved on the merits. Only after resolution on the merits has been achieved does the inquiry into the fees for counsel begin.

Second, in determining the amount of fees — again, both under fee-shifting statutes and in common fund situations — the courts are required to follow the fairly specific guidelines which govern fee computation. As Justice Powell pointed out in his concurring opinion in *Delta Air Lines, Inc.* v. *August*, 101 S.Ct. 1146, 1156 n.3, 67 L.Ed.2d 287, 300, n.3 (1981), the commonly followed lodestar method of fee computation[19] re-

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determination under fee-shifting statutes, see, *e.g.*, *Maher* v. *Gagne*, 448 U.S. 122 (1980) (counsel are entitled to fees where the plaintiff prevails through an out-of-court settlement); *New York Gaslight Club Inc.* v. *Carey*, 447 U.S. 54 (1980) (counsel are entitled to fees under Title VII where the plaintiff prevails through state administrative and judicial proceedings); compare, *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) (counsel are not yet entitled to fees where the plaintiffs prevailed only on procedural matters). Criteria affecting this determination under the Fees Act are set forth in detail in the House and Senate Reports accompanying the Fees Act, H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 6-9, (1976); S.Rep. No. 94-1011, 94th Cong., 2d Sess., 3-6 (1976). With regard to this determination under the common fund theory, see, *e.g.*, *Hall* v. *Cole*, 412 U.S. 1 (1973) (counsel are entitled to fees where a union member plaintiff confers a benefit on the union and its members); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (counsel are entitled to fees where stockholder plaintiffs prove a violation of the securities laws even though the suit does not produce any monetary recovery); compare, *F.D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974) (counsel are not entitled to fees where a Miller Act plaintiff produces an insubstantial common benefit).

[19] The lodestar method of fee computation, which is commonly used by nearly all district courts, was initially adopted by the Third Circuit in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), and followed immediately thereafter by the Second Circuit in *Detroit* v. *Grinnell*

quires courts to consider the hours expended times reasonable billing rates — a process which provides the resulting "lodestar" sum — and thereafter to adjust the lodestar in view of various contingency and quality factors.[20] It is this process, this distinct and independent inquiry, which ultimately provides the resulting fee award.

Third, the inquiry necessitated by a fee request is often, as this Court has recognized, "a matter of some complexity" which ordinarily involves "the taking of evidence and briefing." *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974). See also *Perkins* v. *Standard Oil Co. of California*, 399 U.S. 222, 223 (1970), where the Court held that appellate fees should be awarded by trial courts "after hearing evidence as to the nature and extent of the services rendered." Indeed, the very fact that a separate hearing often

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Corp., 495 F.2d 448 (2d Cir. 1974). Its use has been imposed on the trial courts not only in the Second and Third Circuits but also in the First Circuit, see *Furtado* v. *Bishop*, 635 F.2d 915 (1st Cir. 1980), and in the District of Columbia Circuit, see *Copeland* v. *Marshall*, 641 F.2d 880 (D.C.Cir. 1980) (*en banc*). All other courts of appeals either encourage or permit its use. See, *e.g.*, *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980); *Cleverly* v. *Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979); *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974).

The most complete descriptions of the lodestar method appear in *Copeland* v. *Marshall*, *supra*, a Title VII fees decision; in *Furtado* v. *Bishop*, *supra*, a Fees Act fees decision; and in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (*en banc*) (*"Lindy II"*), a common fund fees decision.

[20] Unlike the criteria governing the calculation of the lodestar sum, several of the criteria encompassed within the contingency and quality factors — *e.g.*, the difficulty of the case and the novelty of the issues — do necessitate a glance back at the merits of the case. See cases cited in n.19, *supra*. This backwards look however, does not involve any reconsideration of, or have any effect upon, the rights already adjudicated or otherwise resolved on the merits. See n.18 and accompanying text, *supra*.

is held,[21] as was the case here, J.A. 56-73, provides considerable support for the conclusion that a fee request involves an independent proceeding supplemental to the original proceeding.

Because of the foregoing characteristics which distinguish fee determinations from a resolution on the merits of a lawsuit, and regardless of whether fees are assessed as part of the costs under a fee-shifting statute or as part of the costs as between solicitor and client under the common fund theory, the fee determination inquiry remains distinct and independent from the rights adjudicated on the merits. In both events or in either event, as Justice Frankfurter concluded for the Court forty years ago in *Sprague*, a fee determination involves "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree." 307 U.S. at 170.

C. Since Rule 59(e) of the Fed. R. Civ. P. Addresses Motions to Correct a Judgment With Regard to Matters Previously Presented, Fee Requests Are Not Governed By the Rule Or By Its 10-Day Time Limitation

In its decision below, not only did the First Circuit dispute Congress' definition of fees "as part of the costs"[22] and dis-

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[21] As a general rule, hearings on fee requests are provided if requested. See, *e.g.*, *Cook* v. *Ochsner Foundation Hospital*, 559 F.2d 270, 273 (5th Cir. 1977); *Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 472 (2d Cir. 1974); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitory Corp.*, 487 F.2d 161, 169 (3d Cir. 1973).

[22] The First Circuit effectively removed the phrase "as part of the costs" from the Fees Act on the ground that the court did "not find it clear" that Congress meant what it said. J.A. 101. Not mentioned by the First Circuit was the "well settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973). See n.14, *supra*.

In any event, the First Circuit sought to overcome the language of the Fees Act and controlling precedent by pointing out three alleged

regard entirely the timeliness holding rendered by this Court in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939).[23] But the First Circuit also committed an even more basic error. It imposed Rule 59(e) without an examination of the purpose or intended application of the rule, and it thereby applied the rule entirely outside of its intended context. By doing so, the First Circuit in this case became the only court of appeals to apply Rule 59(e) to a request for fees under the Fees Act,[24] a result which would have been avoided if the First Circuit had only analyzed Rule 59(e).

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factual differences between the cost item of fees and other items of costs. J.A. 101-103. These *factual* differences, however, do not provide *legal* grounds for reading Congress' chosen language that fees shall be awarded "as part of the costs" out of the Fees Act. See 10-18, *supra*. Moreover, as the Eighth Circuit has observed, "the same characteristics relied upon by the *White* court to distinguish fees from costs also distinguish fees from the merits of an action," and thereby require fees to be determined in an independent proceeding. *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___-___ (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 13-14).

[23] Although the First Circuit did cite *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), in its opinion below, J.A. 104, the First Circuit made no reference to this Court's holding in *Sprague* that a fee request is "not a request for a modification of the original decree." 307 U.S. at 170. Additionally, the First Circuit was unable to distinguish the fact that a fee determination involves an inquiry which is distinct and independent from the rights adjudicated on the merits. See discussion at 18-25, *supra*.

[24] Every other court of appeals that has confronted the timeliness issue had held that Rule 59(e) does not govern a request for fees under the Fees Act. The Fifth, Sixth and Seventh Circuits, in the course of rejecting Rule 59(e), have held that a request for fees "as part of the costs" under the Fees Act is subject only to Rules 54(d) and 58. See cases cited at 12, *supra*.

The Eighth Circuit has also directly rejected Rule 59(e), holding that a fee request is to be determined in an independent proceeding supplemental to the original proceeding. See discussion at 20, *supra*.

The Ninth Circuit, which has not directly rejected Rule 59(e), nonetheless has held that requests for "attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction." *Williams* v. *Alioto*, 625 F.2d 845, 848 (9th Cir. 1980). See also *Terket* v. *Lund*, 623 F.2d 29, 32-34 (7th Cir. 1980). This proposition, which is consistent with awarding fees "as part of the costs" and also consistent with a determination of fees in an independent proceeding, is wholly at odds with Rule 59(e).

The Fourth Circuit on two occasions has declined to apply Rule 59(e) to a request for fees. In *Fox* v. *Parker*, 626 F.2d 351, 352-353 (4th Cir. 1980), the court rejected the application of Rule 59(e) on the ground that the rule could not be raised for the first time on appeal. More recently, in *Hirschkop* v. *Snead*, 646 F.2d 149 (4th Cir. 1981), *aff'g on other grounds* 475 F.Supp. 59 (E.D.Va. 1979), the Fourth Circuit declined to apply Rule 59(e) although the rule had been used by the trial court to deny a fee request. To the extent that these decisions hold that Rule 59(e) is not jurisdictional and cannot be raised for the first time on appeal, the First Circuit's contrary decision here is in error. On the other hand, if Rule 59(e) in conjunction with Rule 6(b) is considered jurisdictional — see generally *United States* v. *Robinson*, 361 U.S. 220, 228-229 (1960) — then the Fourth Circuit's decisions in *Fox* and *Hirschkop* place it squarely in opposition to Rule 59(e)

Finally, several courts of appeals, in determining the appealability or orders on the merits which do not address fees, have held that there is no final and appealable order until fees have been addressed. See, *e.g.*, *Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1980). These decisions, which are discussed in n.27, *infra*, also are wholly at odds with the application of rule 59(e) to a fee request for the simple reason that there is no final and appealable judgment to which Rule 59(e) can be applied until the matter of fees has already been addressed and resolved.

This nearly unanimous rejection of Rule 59(e) by the courts of appeals is not shared, we concede, among the district courts. Although some trial courts have specifically rejected Rule 59(e), see n.6, *supra*, others have applied it in contexts other than under the Fees Act. See generally the cases cited by the First Circuit below, J.A. 97 n.4. In none of these cases, we hasten to add, did the trial courts look to the origins or purposes of Rule 59(e).

The purpose of Rule 59(e), which was added to the Federal Rules of Civil Procedure in 1946, is set forth in a single sentence in the Advisory Committee Report, 5 F.R.D. 433, 476 (1946):

> "*Subdivision (e).* This subdivision has been added to care for a situation such as that arising in *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A. 8th, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry."

Both the situation in *Boaz* and the power asserted in that case provide the context for the proper use of Rule 59(e). Essentially, the situation taken care of was "the absence of express authority [for a trial court] to correct its errors," 146 F.2d at 322, specifically in *Boaz*, the authority to change a dismissal without prejudice to a dismissal with prejudice consistent with defendant's previously filed motion to dismiss. The power asserted was the trial court's "inherent power to correct its error." *Id.* Although the power asserted by the district court was not at that time authorized by the then-existing Federal Rules of Civil Procedure, the Eighth Circuit nonetheless held that the trial "court rightly entertained [defendant's] motion, filed and served two days after the trial, to reconsider and correct the action taken at the close of plaintiff's evidence." *Id.*

Given this original understanding of the purpose of Rule 59(e), the federal courts of appeals have been quite consistent in their view that Rule 59(e) applies only to the reconsideration of matters already considered so that a court may correct an error of law. See generally *Hahn* v. *Becker*, 551 F.2d 741, 745 (7th Cir. 1977) [defendant's post-judgment motion, which was labeled a Motion to Set Aside Judgment, actually sought the "correction of errors of law" and thus was subject to Rule 59(e)]; *Seshachalam* v. *Creighton University School of Medicine*, 545 F.2d 1147 (8th Cir. 1976), *appeal dismissed on other grounds*, 549 F.2d 79 (8th Cir.), *cert. denied*, 433 U.S. 909 (1977) [a motion "entitled a motion for reconsideration" which "drew into question the correctness of the judgment" was "functionally a motion under Fed. R. Civ. P. 59(e)"];

Morgan Guaranty Trust Co. v. *Third National Bank*, 545 F.2d 758, 759-760 (1st Cir. 1976) [plaintiff's "motion to amend the district court's allegedly faulty interest order" which addressed matters that "had been considered" by the court was subject to Rule 59(e) because, "[i]f there was a mistake, it was . . . based on an erroneous interpretation of the law"]; *Sack* v. *Low*, 478 F.2d 360, 363 n.1 (2d Cir. 1973) [because "the short time limit" of Rule 59(e) "implies that the respect in which alteration or amendment is needed should be readily apparent," the rule was inapplicable to a matter not fully before the court at the time judgment was entered]; *Silk* v. *Sandoval*, 435 F.2d 1266, 1268 (1st Cir. 1971) [plaintiff's motion to vacate a dismissal is a motion which "seeks reconsideration of a point of law," and thus is subject to Rule 59(e)]; *Maryland Tuna Corp.* v. *MS Benares*, 429 F.2d 307, 318 (2d Cir. 1970) [the "effect" of a Rule 59(e) motion "is to draw into question the correctness of the judgment to which it relates. It is the functional equivalent of a motion for new trial at common law or a motion for a rehearing in suits in equity before the merger brought about by the Federal Rules of Civil Procedure"].[25]

In other words, a Rule 59(e) motion, like several other post-judgment motions governed by 10-day limitations, basically is a motion for rehearing or reconsideration. Within

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[25] See also *Hauben* v. *Harmon*, 605 F.2d 920 (5th Cir. 1979); *United States* v. *2,186.63 Acres of Land, Wasatch County, Utah*, 464 F.2d 676 (10th Cir. 1972); *Consor* v. *Occidental Life Insurance Co. of Calif.*, 469 F.Supp. 1110, 1118 (N.D.Tex. 1979); *Chil-Mil Corp.* v. *W.T. Grant Co.*, 422 F.Supp. 46, 48 (E.D.Wis. 1976); *U.S. ex rel. Rosner* v. *Comm'r, N.Y.S.D. of Corr.*, 421 F.Supp. 781, 793 (S.D.N.Y. 1976), *modified*, 560 F.2d 84 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977); *American Family Life Assur. Co.* v. *Planned Marketing Assoc., Inc.*, 389 F.Supp. 1141, 1144 (E.D.Va. 1974); *Tucker* v. *Reading Co.*, 335 F.Supp. 1269 (E.D.Pa. 1971); *Continental Cas. Co.* v. *American Fidelity & Cas. Co.*, 186 F.Supp. 173, 178 (S.D.Ill. 1959), *aff'd*, 275 F.2d 381 (7th Cir. 1960); *Rodgers* v. *Conemough & Black Lick R.R. Co.*, 137 F.Supp. 467 (W.D.Pa. 1956).

this category of post-judgment motions are a Rule 50(b) motion for judgment notwithstanding the verdict, which may be made by a party who previously had moved for a directed verdict; a Rule 52(b) motion to amend a court's findings and judgment; a Rule 59(b) motion for a new trial; and a Rule 59(e) motion to alter or amend a judgment. Because each of these motions is directed at matters which previously were presented to a court but on which the court allegedly ruled erroneously, all of the motions are appropriate to be governed by, and they all are governed by, 10-day time limitations. These time limitations cannot be enlarged under Rule 6(b) of the Fed. Civ. P. And, under Rule 4(a)(4) of the Fed. R. App. P., the motions toll the time for filing a notice of appeal.[26]

The interrelated nature of these 10-day motions and their characterization as motions for rehearing or reconsideration are familiar subjects in this Court. In *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978) — a case which involved issues of finality, appealability, and the applicability of Rule 52(b) and 59(e) to habeas corpus proceedings — the Court repeatedly referred to those rules as motions for "rehearing" or "reconsideration." 434 U.S. at 266, 268, 271. And, the Court reminded us, "the timeliness of a motion for rehearing or reconsideration is governed by Rule 52(b) or Rule 59, each of which allows only 10 days." 434 U.S. at 268.

Of similar import is *United States* v. *Dieter*, 429 U.S. 6 (1976), another case which involved the effect of a motion allegedly for reconsideration. Although the motion there was not captioned a motion for rehearing or reconsideration, the Court held that there was "no doubt that in purpose and effect

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[26] Because of this impact, the 10-day motions often are distinguished from a Rule 60(b) motion, which may be filed in some instances "within a reasonable time" and in other instances "not more than one year after the judgment," and which "does not affect the finality of judgment or suspend its operation." Fed. R. Civ. P. Rule 60(b).

it was precisely that, asking the District Court to 'reconsider [a] question decided in the case' in order to effect an alteration of the rights adjudicated," and that the motion accordingly rendered "the original judgment nonfinal for purposes of appeal." 429 U.S. at 8-9 (brackets by the Court), quoting from *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942). Similarly, the Court in *Pink* distinguished between a motion for rehearing, which tolls the time for appeal, and a motion not seeking reconsideration of a question already decided, which does not toll the time for appeal. Observing that the motion at issue "did not seek to have the [lower court] reconsider any question decided in the case," 317 U.S. at 266, the Court held that the motion was not a motion for reconsideration and that its filing thus had not tolled the time for appeal.

The foregoing characterizations of motions for rehearing or reconsideration of matters previously submitted to a court apply with precision to rule 59(e). In fact, the express purpose of Rule 59(e) — based on the Advisory Committee's incorporation of the decision in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944) — is to permit reconsideration of matters already submitted so that a court can correct a previous error of law.

A request for attorney's fees simply does not fit this mold. It does not seek reconsideration of matters previously presented, nor does it seek to correct a mistake of law addressed in the judgment on the merits. As the Fifth Circuit succinctly summarized, a request "for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)." *Knighton* v. *Watkins*, 616 F.2d 795, 797 (5th Cir. 1980).

Although an inquiry into the reason for the First Circuit's misapplication of rule 59(e) is not directly relevant here, the Eighth Circuit has suggested that the First Circuit's decision was caused by its excessive concern about piecemeal appeals:

"This concern seems to pervade the entire opinion and might be regarded as the primary rationale of the decision." *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___ n.8 (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 14 n.8).

The answer to appellate court worries about piecemeal appeals,[27] however, is not found in the erroneous application of Rule 59(e) to a request for fees. A more appropriate answer — which doesn't involve the misapplication of Rule 59(e) — is

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[27] It should be pointed out that several courts of appeals — concerned about piecemeal appeals in the context of deciding appealability issues — have rendered decisions which are diametrically opposed to the First Circuit's decision here because they directly bar the application of Rule 59(e) to a fee request. Specifically, in determining the appealability of orders on the merits which do not address fees (at least in cases where fees were requested in the pleadings), several courts of appeals have held that there is no final and appealable order until the question of fees has been addressed. *See, e.g., Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1980); *Johnson* v. *University of Bridgeport*, 629 F.2d 828 (2d Cir. 1980); *Richerson* v. *Jones*, 551 F.2d 918 (3d Cir. 1977). Under these decisions there is no final judgment to which Rule 59(e) can be applied until a fee request has been submitted and determined.

The correctness of the position taken by these courts of appeals on this appealability issue has not been conclusively resolved by this Court. Support for the position is found in *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742 (1976), where this Court, in holding a liability judgment nonfinal and unappealable, observed that plaintiffs had "requested an injunction, but did not get one; they requested damages, but were not awarded any; they requested attorneys' fees but received none." See also *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 479-480 n.5 (1980).

At the same time, there is considerable authority rejecting this approach. See, *e.g., Terket* v. *Lund*, 623 F.2d 29 (7th Cir. 1980), *Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980); *Swanson* v. *American Consumer Industries Inc.*, 517 F.2d 555 (7th Cir. 1975); see also, *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___ (8th Cir. June 11, 1981) (No. 80-1315), *prospectively*

the approach adopted by the Seventh Circuit in *Terket* v. *Lund*, 623 F.2d 29 (7th Cir. 1980) (holding that a separate notice of appeal must be filed from the distinct and independent order awarding fees). There the Seventh Circuit directed that "district courts in this circuit should proceed with attorney's fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisified with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits." 623 F.2d at 34 (footnote omitted). In fact, under Rule 3(b) of the Fed. R. App. P., "[a]ppeals may be consolidated by order of the court of appeals upon its motion."

Aside from this better perspective on appealability and from the fact that the application of Rule 59(e) to a request for fees is erroneous as a matter of law, the First Circuit's 10-day rule is entirely uneconomical and contrary to sound judicial policy because of the problems it creates for trial courts and litigants alike.[28] The court's 10-day rule virtually assures fewer settle-

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overruling 623 F.2d 521 (8th Cir. 1980). In fact, as Justice Rehnquist observed in his dissenting opinion in *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 482-489 (1980), the separate appealability of decisions on the merits and of awards of fees dates back at least to *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), presaged in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and indeed in *Trustees* v. *Greenough*, 105 U.S. 527 (1882).

Although appealability is not at issue here, both lines of cases preclude the application of Rule 59(e) to a request for fees.

[28] Although the First Circuit was of the view that its 10-day rule would be "more economical of a court's time," J.A. 105, the court did not at all explore the many less economical ramifications that flow from its decision. Some of these ramifications, which "result in a less economical use of judicial resources," were explored by the Eighth Circuit in *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, ___ n.8 (8th Cir. June 11, 1981) (No. 80-1315) (Slip Opinion at 14 n.8), where the court pointed out that fee requests would have to be filed after every final order thereby causing

ments and greater docket congestion. Rather than being settled on the merits, cases will be forced to trial and decision. And rather than allowing time for fee settlements after the entry of judgment, the First Circuit's decision requires fee applications to be filed immediately for resolution by the courts.

The impact of the First Circuit's decision on settlements is a real one. With fees required to be negotiated at the same time as the merits of a case — a procedure which the First Circuit formally endorsed, J.A. 106 — class counsel invariably will be asked by their adversaries to accept less for their clients or less for themselves. Acceptance of the former is unethical.[29] Acceptance of the latter is both unrealistic and contrary to the express purposes of the Fees Act.[30] The obvious result is that cases which could be settled on the merits will instead go to trial.

"fragmentation of the same litigation" solely over fees, that the shortness of the 10-day period would make out-of-court fee settlements virtually impossible, and that the "First Circuit's procedure may force an appeal of the entire case where the sole issue of concern to the appellant may be the propriety or size of the attorney's fees award."

[29] The mere possibility of a sweetheart settlement — "[w]e cannot indiscriminately assume, without more, that the amount of fees have [sic] no influence on the ultimate settlement obtained for the class when, along with the substantive remedy issues, it is an active element of negotiation" — led the Ninth Circuit to conclude, as noted hereafter, that it "would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place." *Mendoza* v. *United States*, 623 F.2d 1338, 1352-1353 (9th Cir. 1980).

The ethical problems imposed by the First Circuit's 10-day rule are set forth more fully at 37-41, *infra*.

[30] Not only did Congress state that it was "proper to award counsel fees" where the substantive litigation "terminates by consent decree," and that counsel "should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion," H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976), but the ex-

The First Circuit's decision also removes from the negotiation tables most post-judgment fee requests. Because of the First Circuit's 10-day limitation, counsel for the prevailing parties will have to prepare and serve within 10 days: a fee application, time records and affidavits in support thereof, affidavits addressing counsel's hourly rates as well as the various contingency factors and quality factors relevant to fee computation, and a supporting brief.[31] No time can be lost attempting to negotiate a settlement concerning the availability or amount of fees. Instead, all fee requests will have to be filed with the courts. And once the applications have been

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press purpose of the Act is to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." *Id.* at 9. Without the prospect of reasonable fee awards, lawyers will decline to represent those whose rights have been violated. This would then reflect the situation that Congress described at the time it enacted the Fees Act:

> "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." *Id.* at 1.

Contrary to the intent of Congress, the First Circuit here suggested that counsel might be willing to "waive fees altogether," J.A. 107; encouraged their adversaries in any event to negotiate a fee waiver in return for relief for the class; and, indeed, turned the availability of fees for successful counsel into a procedural nightmare. In short, the First Circuit has negated the very purposes of the Fees Act.

[31] The First Circuit, like all other courts of appeals, requires extensive documentation in support of a fee application. See *Souza* v. *Southworth*, 564 F.2d 609 (1st Cir. 1977); *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). These requirements cannot be taken lightly, for the burden is on the movant lawyers to prove entitlement to a fee award. *Id.*; see also, *Nadeau* v. *Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

submitted, with the positions of counsel having hardened, most applications of necessity will have to be resolved by the courts. The result, again, is fewer settlements and more docket congestion.

In addition to its effect of discouraging settlements, the First Circuit's decision plays havoc with appellate procedures and actually increases the number of fee applications that will be filed. Since final judgments on the merits would be suspended by the filing of fee requests, both injunctive relief and appeals on the merits will often be delayed. The former is contrary to this Court's decision in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), which held that it would be "undesirable to delay" the implementation of injunctive relief "in order to resolve the question of fees simultaneously." The latter is contrary to the allowance and resolution of appeals on the merits — which sometimes result in a reversal on the merits — before fee applications are even filed. See generally *Perkins* v. *Standard Oil Co. of California*, 399 U.S. 222 (1970); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Moreover, since "many final orders may issue in the course of the litigation," *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974), parties who prevail would have to file separate fee applications within 10 days of every such final order rather than awaiting the conclusion of the entire litigation.

As these considerable problems, indicate, the application of Rule 59(e) to a request for fees is unwise as a matter of policy. More basically, it is erroneous as a matter of law. Rule 59(e) was designed to authorize the power asserted in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F.2d 321, 322 (8th Cir. 1944): the power "to reconsider and correct" a judgment, the power of a court "to correct its errors." As such, Rule 59(e) cannot and does not apply to the entirely new matters raised by a request for fees.

II. A Court May Not Require Simultaneous Negotiation Of The Merits And Of Fees In A Class Action Lawsuit Because Of The Ethical Conflicts Thereby Imposed On Class Counsel

By erroneously applying Rule 59(e) to a request for fees, and thereby allowing no time for the settlement of fees after resolution of the merits, the First Circuit below erred in yet another way. It held that, in a "consent decree context," it could *not* find "anything wrong with requiring the parties to face up to the issue of fees in their settlement negotiations," J.A. 106, *i.e.*, in their negotiations on the merits. Perceiving no ethical conflict in counsel's own very real interest in the fee award, the First Circuit even added that it did not mean to "suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree." J.A. 107.

What is manifestly wrong about the First Circuit's decision is the very real ethical problem it imposes upon counsel, especially class counsel.[32] Also wrong is one of the remedies suggested by the First Circuit for the ethical problem it imposed: that counsel for prevailing parties "may, of course, decide to waive fees altogether," J.A. 107, a proposition which is directly at variance with the purposes of the Fees Act.

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[32] The First Circuit's rule imposes ethical conflicts on both non-class counsel and class counsel. The conflict imposed on class counsel is greater, however, because class counsel must maintain on behalf of the representative plaintiffs a special trust relationship with the absent class. Simultaneous negotiation of the merits of a class action and of fees can be viewed as a breach of that trust relationship sufficient to deny class certification. *Munoz* v. *Arizona State University*, 80 F.R.D. 670, 671-672 (D.Ariz. 1978); *Lyon* v. *State of Arizona*, 80 F.R.D. 665, 669 (D.Ariz. 1978).

This case, as noted in the Statement of the Case at 2, *supra*, was certified as a class action. J.A. 1-2, 93.

Finally, the First Circuit's rule favoring simultaneous negotiation also is inconsistent with the decisions of this Court.

The ethical dilemma imposed by the First Circuit arises from the fact that counsel themselves, although responsible for advancing the interests of their clients, have a very real interest of their own in the fee award. The nature of this conflict was aptly described, in the course of discouraging simultaneous negotiation, in *Regaldo* v. *Johnson*, 79 F.R.D. 447, 451 (N.D.Ill. 1978) (citation omitted):

> "Everyone familiar with civil rights litigation knows that a plaintiff in such suits rarely pays attorney's fees or the costs of litigation. For these reasons, a motion for fees and costs in such a case, although made in the name of the plaintiff, is really one by the attorney. This interest in the fee makes it improper for the lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions."

Recognizing the seriousness of this conflict, two courts of appeals, the Third and Ninth Circuits, have now adopted rules strongly discouraging the simultaneous negotiation of a substantive judgment on the merits and of the availability or amount of fees. The Third Circuit's ironclad view is set forth in *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977), where the court required avoidance of such ethical conflicts by directing "trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees." The Ninth Circuit, in *Mendoza* v. *United States*, 623 F.2d 1338, 1352-1353 (9th Cir. 1980), agreed, initially observing that the conflicts do not disappear where "there is no fund or money damages being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict between class counsel and members of the class remains." Since it "would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place," the Ninth Circuit concluded: "we strongly discourage the simultaneous ne-

gotiation of attorneys fees and substantive issues in class action settlement negotiations." *Id.*[33]

The ethical conflict imposed by the First Circuit not only is apparent from the law but also was expressly conceded by respondents' counsel in the trial court. As pointed out in nn.1&2 *supra*, respondents' counsel stated as his "opinion" that: "I should not be holding the consent [decree] hostage to attorney's fees because I might have an ethical problem." J.A. 69. Stated otherwise, "if you hold or require an attorney in this situation to forego or withhold attorneys' fees in order for his clients to get what they wanted in the first place, from what I have read there is an ethical problem here." J.A. 88.[34]

Disregarding *Prandini* and *Mendoza*, the ethical problem itself, and the admissions by counsel for the respondents in this case, the First Circuit suggested as one possible solution that counsel could simply "waive fees altogether." J.A. 107.

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[33] Several other courts of appeals have recognized this conflict of interest problem but have not had occasion to rule on the ethical question posed by simultaneous negotiation. See, *e.g.*, *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 503 n.1 (5th Cir. 1981); *Shelton* v. *Pargo, Inc.*, 582 F.2d 1298, 1315 (4th Cir. 1978); *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 425-426 (7th Cir. 1977).

[34] Prior to the ruling by the First Circuit here, counsel in other cases — like counsel here — increasingly recognized the ethical issue involved and thus postponed any discussion of fees until after resolution of the merits. See *e.g.*, *Chrapliwy* v. *Uniroyal, Inc.*, 509 F.Supp. 442, 448 (N.D.Ind. 1981); *Williams* v. *Ryan*, 78 F.R.D. 364, 369 (S.D.Ga. 1978). This, in fact, is precisely what occurred between counsel in *Maher* v. *Gagne*, 448 U.S. 122 (1980). See also the cases cited in n.8, *supra*.

Since respondents' counsel here — like defense counsel in the foregoing cases — incurred no credible suprise with regard to the subsequent request for attorney's fees, respondents' argument in the First Circuit below that the consent decree on the merits should be vacated, J.A. 95, is wholly without merit.

This proposal, however, is directly contrary to the express purpose of the Fees Act, which is to provide a financial incentive for counsel to represent non-fee-paying clients whose civil rights have been violated See n.30, *supra*. Additionally, the First Circuit's suggestion is squarely opposed by that part of the House Report accompanyaing the Fees Act which initially observes that, "if the litigation terminates by consent decree, for example, it would be proper to award counsel fees," and thereafter emphasizes that counsel "*should not be penalized for seeking an out of court settlement*, thus helping to lessen docket congestion." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976) (emphasis added). See also *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980), where this Court — in upholding an award of counsel fees rendered after the parties had reached a consent decree on the merits — relied on the virtually identical language in S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976).

The First Circuit's approval of concurrent consideration of the merits and of fees also is inconsistent with this Court's decision in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974). After initially observing in *Bradley* that "the resolution of the fee issue may be a matter of some complexity and require, as here, the taking of evidence and briefing," this Court held that it would have been undesirable for the trial court to "delay the implementation of a desegregation plan in order to resolve the question of fees simultaneously. The District Court properly chose not to address itself to the question of the award until after it had approved the non-interim plan for achievement of the unitary school system." 416 U.S. at 723. In the same manner, it is undesirable to discourage a settlement on the merits in order to force an attempted resolution of the question of fees simultaneously. And, where the settlement resolves the merits but does not address fees, it again is incorrect to suspend that judgment on the merits in order to then resolve the question of fees simultaneously. But that is precisely the result achieved by holding that a fee request is subject to Rule 59(e), a rule that never

was intended to apply to a fee request which, by its very nature, does not seek reconsideration of an error of law allegedly committed by a court in rendering a judgment on the merits with regard to matters previously submitted.

CONCLUSION

For the foregoing reasons, the decision of the First Circuit should be reversed.

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APPENDIX

APPENDIX

STATUTES AND RULES INVOLVED

This federal statute involved in this case is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended, which provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, Sections 1681-1686 of U.S.C. Title 20] . . . or Title VI of the Civil Rights Act of 1964 [Sections 2000d, *et seq.*, of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves Rules 54(b), 54(d), 58 and 59(e) of the Fed. R. Civ. P., which provide in whole or pertinent part:

Rule 54(b)

> *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 54(d)

> *Costs.* Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing

party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 58

Entry of Judgment . . . Entry of the judgment shall not be delayed for the taxing of costs.

Rule 59(e)

Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

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No. 80-5887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD H. WHITE, *Petitioner*,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Whether a post-judgment request for an award of attorney's fees under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. §1988, as amended [the "Fees Act"], is a motion to alter or amend a judgment governed by Rule 59(e) of the Federal Rules of Civil Procedure.

II. Whether the First Circuit properly urged counsel to consider the issue of attorney's fees during settlement negotiations.

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IN THE

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OCTOBER TERM, 1980

RICHARD H. WHITE, *Petitioner*,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

On March 8, 1976, the petitioner, Richard H. White, commenced an action in the United States District Court for the District of New Hampshire challenging certain administrative procedures of the respondent New Hampshire Department of Employment Security. The petitioner alleged that delays in the processing of a certain class of applications for unemployment benefits violated the due process clause of the Fourteenth Amendment of the United States Constitution as well as the "when due" provision of the Social Security Act, 42 U.S.C. §503(a) (1), and also raised a pendent state claim alleging violation of state law regarding determination of eligibility for benefits. J.A. 5-16. The complaint alleged jurisdiction under 28 U.S.C. §§1343 (3) and (4) and 42 U.S.C. §1983. J.A. 6. The complaint requested class certification under F.R.Civ.P. 23(c) (1) and sought declaratory and injunctive relief under 28 U.S.C. §§2201 and 2202 and F.R.Civ.P.57, but did not request attorney's fees. J.A. 13-15.

The district court (Bownes, J.) granted class certification on May 11, 1976, and the case was tried (after extensive discovery) to the court on October 12 and 13, 1977. In its opinion and order of November 15, 1977, the court found that respondents' procedure for processing the claims in question did violate the "when due" provision of the Social Security Act and on that basis entered an order granting declaratory and injunctive relief. J.A. 25-26. The court entered a subsequent amendatory order on December 16, 1977. J.A. 27-28. Neither order made any reference to a possible award of attorney's fees.

The respondents appealed on December 22, 1977 to the Court of Appeals for the First Circuit. J.A. 3. While the appeal was pending, the respondents initiated settlement negotiations with petitioner, and an agreement was ultimately reached. J.A. 44-45, 54-55. The consent decree was signed by the parties on December 8, 1978, and upon respondents' motion, the First Circuit remanded the matter to the district court on December 11, 1978 for the purpose of entertaining the decree. J.A. 29-30. The district court (Devine, J.) approved the decree on January 26, 1979 and the clerk entered judgment the same day. J.A. 31-33. Neither the consent decree nor the judgment made any reference to attorney's fees.

Over four months after entry of judgment, the petitioner, on June 7, 1979, moved for fees under 42 U.S.C. §1988. After respondents' objection, the district court conducted a hearing, and on August 30, 1979, awarded the petitioner attorney's fees in the amount of $16,644.40. Respondents' subsequent motion to vacate the consent decree, J.A. 81-82, was denied on October 1, 1979. J.A. 83-91. Respondents appealed both the fees award and the denial of the motion to vacate. Both appeals were consolidated by the First Circuit. J.A. 4.

The Court of Appeals (Campbell, J.), on August 12, 1980, vacated the fee award. *White v. New Hampshire Department of Employment Security*, 629 F.2d 697 (1st Cir. 1980). The court ruled that the district court did not have jurisdiction over the

late fee application. In holding in favor of the respondents, the court considered only the timeliness issue, finding that the post-judgment motion for the award fees under §1988 was a motion to alter or amend the judgment and was hence governed by Rule 59(e) of the Federal Rules of Civil Procedure. 629 F.2d at 699. *See* J.A. 92-107.

The court found no clear indication that Congress, by generally describing attorney's fees in relation to costs of litigation, intended that attorney's fees be subject to the provisions for costs set out in Rule 54(d) of the Federal Rules of Civil Procedure, and found the "fees/costs comparison strained at best." 629 F.2d at 702-703.

The Court of Appeals further reasoned that the ultimate award of fees is clearly a part of the relief sought by the prevailing party to be granted during the course of the proceeding. 629 F.2d at 704. Analyzing the relevant language of §1988, that in "an action or proceeding to enforce" the civil rights law fees would be available, the court found that a fee award under §1988 is not sufficiently collateral and independent to be considered in a proceeding apart from the disposition of the merits.

Finally, the Court of Appeals addressed the ethical conflict hypothesized by the petitioner by noting that its decision requires only that the party seeking an award of fees "face up to the issue of fees" in an procedural sense before entry of final judgment. 629 F.2d at 705. The court noted that failure to confront the fees issue "muddied the waters," but cautioned that attorneys in settlement negotiations should not hold out, against a client's best interests, for a specific fee award to be included in the consent decree. Nothing was to be gained, noted the court, by leaving the fees issue unmentioned and by submitting the issue to the court months later under conditions which cast a shadow upon the settlement itself. *Id.*

The petitioner thereafter petitioned this Court for a writ of certiorari on December 10, 1980, which was granted on May 18, 1981. ___ U.S. ___, 68 L.Ed.2d 839 (1981).

SUMMARY OF ARGUMENT

I. A. American courts have traditionally treated an award of attorney's fees differently from an award of court costs. Although court costs are routinely granted to a victorious party, attorney's fees are not unless specifically authorized by statute or unless the request falls within an exception to the general prohibition of fees awards. Congress, in enacting the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, as amended, recognized and preserved the traditional distinction between fees and costs. The Congress, by authorizing an award of attorney's fees as part of the costs, did not intend to abrogate the longstanding distinction between fees and costs. The purpose of the Fees Act was to provide all civil rights litigants an opportunity to recover fees, not to create a "startling new remedy."

Rule 54(d) is therefore inapplicable to a motion for attorney's fees under the Fees Act. The term "costs" as used in Rule 54(d) and 28 U.S.C. §1920 does not include attorney's fees. The meaning of "costs" under the statute and rule must be determined by reference to the contemporaneous meaning of the term at the time the statute and rule were enacted. Recoverable costs have traditionally not included attorney's fees, and therefore both Rule 59 and §1920 were not intended to govern a fees request. The rule and the statute recognize the important differences between fees and costs. The routine award of costs is usually made in the absence of controversy. Items of taxable costs are usually fixed in amount and of relatively small expense. To the contrary, an attorney's fees award is frequently disputed and requires careful review by a court to determine its reasonableness. Fees awards also can impose a significant financial burden on the losing party. Given these fundamental differences between costs and fees, it is apparent that Rule 54(d) is not applicable to a fees request.

B. 1. A post-judgment award of attorney's fees is governed by Rule 59(e). This rule applies to final judgments, and is operative when the successful party has failed to make a request for fees prior to the entry of final judgment.

However, if the prevailing party has made the request prior to entry of judgment, the judgment will not be final until the fees issue is resolved. In this situation, Rule 59(e) does not apply as the judgment is not final until all issues are resolved. Where the fees litigant has not made the fees request prior to entry of final judgment, Rule 59(e) gives the party a second chance to obtain the fees award by making the request within ten days after entry of final judgment.

2. A motion for attorney's fees is a motion to alter or amend a judgment within the meaning of Rule 59(e). The rule governs all motions which attempt to alter or amend the prior judgment. A fees request is governed by this final judgment rule unless it falls within an exception to the rule. The two exceptions arise when an attorney seeks to enforce a right of his own and when fees are sought out of a common fund. As the Fees Act allows an attorney's fee award only to a prevailing party, only the common fund exception might apply to this case.

3. An award out of a common fund is fundamentally different from an award under the Fees Act. Common fund awards, in theory, apportion the fees award among co-plaintiffs. The adverse party's liability is not altered by charging the common fund with attorney's fees. The Fees Act instead places the financial burden upon the losing party. He therefore has a direct and compelling interest in the assessment of fees, as his potential liability is significant. Thus, an attorney's fees award under the Fees Act does not fall within the common fund exception.

4. A request for attorney's fees is intimately tied to the merits of the underlying action. Congress has authorized payment "in any action or proceeding . . . to a prevailing party." The language of the statute ties the fees award directly to the merits of the case and directs that it be made in the same motion or proceeding. A post-judgment motion for fees, by seeking to impose on the losing party a significant additional liability arising out of the matter otherwise resolved by the judgment, is precisely the type of request to

alter or amend the prior judgment that is contemplated by Rule 59(e). By requiring a timely submission for fees, Rule 59(e) also promotes fairness to all parties, is sensitive to the policy of finality of judgments, and promotes the interests of judicial economy.

II. The First Circuit decision avoids ethical conflicts. Parties to settlement negotiations are not required to simultaneously negotiate a fees award with the merits. Parties are only to "face up" to this issue. This approach is practical in that it recognizes the existence of the fees issue and encourages parties to attempt its settlement. A safety valve is provided, however, as parties need *not* resolve the fees issue in settlement negotiations. It may, as the First Circuit recommended, be specifically reserved in a consent decree for subsequent consideration by the court. The First Circuit decision clearly does not create an ethical conflict. Rather, it suggests a practical approach to settlement negotiations. The decision promotes fairness to all parties by giving both sides an opportunity to be aware of the intentions of the opposing party and the extent of their liability in reaching settlement, and in this regard furthers, not hinders, ethical considerations.

ARGUMENT

I. A POST-JUDGMENT MOTION FOR ATTORNEY'S FEES UNDER 42 U.S.C. §1988 SUBSTANTIVELY ALTERS THE PRIOR JUDGMENT AND MUST THEREFORE MEET THE REQUIREMENTS OF RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 59(e) of the Federal Rules of Civil Procedure provides that motions to alter or amend judgments shall be filed within ten days after entry of judgment. This rule applies to motions for attorney's fees, unless a fees request is in effect a motion for costs under F.R.Civ.P. 54(d) or such a request constitutes a matter collateral or independent to the merits of the underlying case. Contrary to petitioner's assertions, a fees motion under 42 U.S.C. §1988 cannot be considered to be a motion for costs governed by Rule 54(d), nor is such a

motion so collateral or independent to the merits of the main action that it may be determined at any time after entry of judgment.

A. As the Concept of the Award of Attorney's Fees Differs Substantially From the Concept of Payment of "Costs," Rule 54(d) is not Applicable to a Motion for Attorney's Fees under 42 U.S.C. §1988.

The traditional American Rule governing the award of attorney's fees carefully distinguishes between the "costs of litigation", which are borne by the parties to the litigation, and "court costs", which are usually allowed to a prevailing litigant. The American Rule, deeply rooted in our system of justice, requires that all litigants pay their own expenses of litigation, including attorney's fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714 (1967). However, certain routine "costs" are by statute, 28 U.S.C. §1920, and rule, F.R.Civ.P. 54(d), usually recovered by the prevailing party. These costs are capable of routine determination and are usually awarded without engendering controversy. *White*, 629 F.2d at 702. The American Rule creates a distinction between expenses of litigation such as attorney's fees and routine court costs. The latter may be recovered as a matter of course; the former may be allowed only if provided by statute or if the fee request comes within one of the narrow exceptions to the rule.[1] *Alyeska* at 258, 264.

In response to this Court's *Alyeska* decision, which precluded judicial application of the "private attorneys general" concept in the absence of statutory authorization, the Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 42 U.S.C. §1988, as amended. *See*, S.REP. No. 94-1011, 94th Cong., 2d Sess. (1976). The purpose of

[1] The exceptions to the American Rule include award of fees for disobedience of a court order, exercise of bad faith, *Alyeska* at 258, payment of attorney's fees out of a common fund, *Cohen v. Beneficial Industrial Finance Corp.*, 337 U.S. 541 (1949), and cases in which an attorney seeks to enforce a right of his own. *See Dietrich v. Grinnel Corp.*, 495 F.2d 448 (2d Cir. 1974).

this statute was to ensure that prevailing litigants in the various civil rights cases would have a similar opportunity to receive attorney's fees. The Fees Act provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[2]

This language does not, however, abrogate the traditional distinction between costs and attorney's fees. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, (1980); *Obin v. District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, 49 U.S.L.W. 2814 (8th Cir. June 11, 1981) (No. 80-1315); *Hirschkop v. Snead*, 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds*, 646 F.2d 149 (4th Cir. 1981). *Contra, Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980).

Petitioner asserts that Congressional use of the phrase " . . . attorneys fees as part of the costs" is dispositive and fees may therefore be recovered at any time after judgment through Rule 54.[3] This reasoning suggests that recovery of fees by the

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[2] This language is borrowed from similar language under other civil rights statutes. *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3. In considering the applicability of Rule 54(d) to an attorney's fees request, the Senate Report on the Civil Rights Act of 1964 stated that attorney's fees could not be " . . . awarded as costs, for attorney's fees are not costs as that term is used in rule 54(d) of the Federal Rules of Civil Procedure." *U.S. Code Congressional and Administrative News*, 88th Cong., 2d Sess, 2360 (1964). The final version of this legislation included the subject attorney's fees provision.

[3] However, under 42 U.S.C. §1988, a prevailing party may receive costs but not obtain an award of attorney's fees. Similar results have occurred in application of the attorney's fees provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000-e(5) (k). *See McCampbell v. Chrysler Corp.*, 425 F.Supp. 1326, 1328 (E.D. Mich.

prevailing party is through a ministerial process. This approach ignores important language in the statute which demonstrates that attorney's fees are to be treated separately from the matter of routine costs.

The Fees Act states in part:

> "... the court, *in its discretion, may* allow the prevailing party ... *a reasonable attorney's fee* as part of the costs." (emphasis added)

This language indicates that an award of attorney's fees shall be the result of the court's careful consideration of an appropriate request for fees. Indeed, many of the circuit courts have established detailed procedures for the consideration of fee awards. *See, e.g., King v. Greenblatt,* 560 F.2d 1024 (1st Cir. 1977), *cert. denied,* 438 U.S. 916 (1978); *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). To the contrary, statutory costs may be awarded by the clerk, 28 U.S.C. §1920, and may be taxed upon one day's notice. Rule 54(d). As noted by the First Circuit, a fee award, in addition to requiring scrutiny by the court, may well be the source of dispute between the parties and could lead to imposition of a significant financial burden on the losing party. 629 F.2d at 703. *See also Obin v. District No. 9 of the Int'l Ass'n of Machinists,* ___ F.2d ___, 49 U.S.L.W. 2814 (8th Cir. June 11, 1981) (No. 80-1315); and *Hirschkop v. Snead,* 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981), stating:

> "There can be no doubt, however, that the attorney's fee to be allowed 'as part of the costs' under §1988 is qualitatively different from the costs allowed as of course to the prevailing party under Rule 54(d)." *Id.* at 61.[4]

1977). *See, The U.S. As Prevailing Defendant in Title VII Actions: Attorneys' Fees and Costs,* 66 Geo. L.J. 899, 917-922 (1978).

[4] As noted by the Solicitor General in the *Brief for the United States as Amicus Curiae* at 7-8, "... Congress was aware of at least sixteen other statutory provisions in existence at the time of passage of section 1988 that contained the identical language. Congress was

Fees, unlike costs, are not allowed as a matter of right to the prevailing party. A court awards attorney's fees in the exercise of its discretion, guided by a substantial body of case law. A successful plaintiff in a civil rights action should ordinarily recover attorney's fees unless special circumstances would render such an award unjust. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 403 (1968). A prevailing defendant, on the other hand, may receive a fees award upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).[5] The fact that one is a prevailing party is not dispositive of the fees award issue. Prior to an award to a prevailing plaintiff, there may be an inquiry as to the existence of special circumstances[6] that might bar the award. Prior to the award to a prevailing defendant, there must be an inquiry as to whether the plaintiff's case was frivolous, unreasonable, or without foundation. In either case, there must be review by the court.

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also aware that there were approximately 90 federal statutory provisions providing in similar terms for an award of attorneys fees. . . . We do not believe that the particular wording of the fee provision is of substantial assistance in determining the timeliness of a motion for fees."

[5] Although *Christiansburg* and *Newman* did not review the Fees Act, they construed language identical to the Fees Act. Congress, in considering the "prevailing party" language of the act, specifically approved these judicial interpretations and intended that they be applied to the Fees Act. S.REP. No. 94-1011, 94th Cong., 2d Sess. 6 (1976), *accord*, *Hughes v. Rowe*, ___ U.S. ___, 66 L.Ed.2d 163 (1980).

[6] "Special circumstances" mitigating against an award otherwise authorized by statute are illustrated in the following decisions: *Aho v. Clark*, 608 F.2d 365 (9th Cir. 1979) (consent agreement sought to eliminate further expense of litigation; therefore, award of fees alters circumstances giving rise to signing of decree, and is unduly harsh and unjust; moreover, as purpose of act is to attract competent counsel, Congressional policy not advanced, as litigation com-

The House Report on the Fees Act noted that the legislation had three key features: awards *may* be made to the prevailing party, fees are to be allowed in the court's discretion, and awards are to be reasonable. H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 6 (1976). In discussing the discretionary aspect of a fees award, the House Judiciary Committee noted that it

> "... adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions." *Id.* at 8.

This cautious approach demonstrates that the Congress did not intend to make a radical departure from existing precedent relating to the issue of attorney's fees.

> "This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal Courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May [*Alyeska*, 421 U.S. 420 (1975)] decision." S.REP. NO. 94-1011, 94th Cong., 2d Sess. 6 (1976).

The respondents submit that by treating a fee request under 42 U.S.C. §1988 as a request for costs under Rule 54(d), the petitioner is asking this Court to fashion the very "startling new remedy" Congress specifically sought to avoid.

In support of this contention, petitioner cites *Hutto v. Finney*, 436 U.S. 678 (1978) for the proposition that fees are costs and a request for fees is therefore covered by Rule 54(d). A close examination of *Hutto* is therefore in order. *Hutto* concerned conditions of confinement in the Arkansas prison system, which was described as a "dark and evil world

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menced prior to effective date of Fees Act); and *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978) (where damage to complainant was essentially of a private nature, and where no evidence of bad faith on the part of the defendant existed, award of fees deemed unnecessary to further purposes of Fees Act (cited with approval in *Aho v. Clark, supra*)).

completely alien to the free world." *Hutto* at 681. After protracted litigation, the district court found that the state had acted in bad faith and awarded attorney's fees. *Id.* at 685. On appeal, the circuit court awarded additional fees based upon 42 U.S.C. §1988. The state challenged both awards as being contrary to the Eleventh Amendment of the United States Constitution. The district court award was affirmed on the basis of the bad faith exception to the American Rule. In affirming the circuit court's award of fees on appeal, this Court, citing Congress' failure to exempt states from fee awards, noted that the Eleventh Amendment does not bar awards of attorney's fees against states. *Id.* at 692. This Court also noted that the Eleventh Amendment had not traditionally been viewed as a bar to an award of costs against the states, and it similarly would not bar an award of "fees as part of the costs" under 42 U.S.C. §1988. *Id.* at 695. This Court found there was ample precedent for Congressional authorization of an award of fees as part of costs, noting, however, that fees are not routinely awarded. *Id.* at 697.

However, *Hutto* provides little guidance to the decision of the issues in this case. In *Hutto*, the state, which was specifically found to have acted in bad faith, sought to shield itself from liability for attorney's fees by invoking the Eleventh Amendment. This Court found that Congress, in enacting the Fees Act, provided an additional enforcement remedy to the more general provisions of 42 U.S.C. §1983, this remedy being enacted pursuant to the constitutional enforcement powers under section 5 of the Fourteenth Amendment to the United States Constitution. Thus, this Court found in §1988 an implied Congressional waiver of the states' Eleventh Amendment immunity. This Court ruled in effect that it would not single out attorney's fees as one type of litigation expense, distinguishable from costs, which an unsuccessful state defendant would not have to pay. The *Hutto* court did not specifically address the issue of the distinction of fees and costs, nor did it address the issue of the timeliness of a fees request. Indeed, one may take the view that *Hutto* viewed fees as one of the many costs — or expenses — of litigation for which a prevailing party may seek

recovery against a state under the Fees Act, without regard to Eleventh Amendment immunity.

This Court has recently spoken on the issue of the distinction between fees and costs. In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court rejected the "superficially appealing argument" that the language of the Fees Act requires that attorney's fees be treated as costs under 28 U.S.C. §1927. *Id.* at 758. The issue was what sanctions could be imposed upon an attorney who unreasonably extended court proceedings. Roadway argued that as a prevailing party in a 42 U.S.C. §1983 action, it should not be limited to the remedy of 28 U.S.C. §1927[7] against an unreasonable lawyer, and that §1988 should be read into §1927 to allow fees as part of the costs. *Id.*

In construing the word "costs," this Court focused on the contemporaneous meaning of the term when the predecessor statute to 28 U.S.C. §1927 was enacted. *Id.* at 759. When the statute was first enacted in 1813 and subsequently amended in 1853, the term "cost" was not understood to include attorney's fees. Section 1927 was viewed as only allowing recovery of excess costs against counsel who vexatiously prolonged litigation. This Court ruled that the more reasonable construction was that the definition of "costs" in the companion statute of 28 U.S.C. §1920[8] controlled those costs which could be recovered under §1927, a result which is consistent with the American Rule on recovery of attorney's fees. In the absence of Congressional addition of the term "fees" to either §1927 or §1920, this Court declined to judicially impose the remedy of fee recovery. *Id.* at 760.

A similar analysis governs the application of Rule 54(d). This rule continues the general rule that attorney's fees are distinguishable from court costs. *See generally* 6 MOORE'S FEDERAL PRACTICE *p*54.70 (2 Ed. 1976). Since attorney's fees have not traditionally been considered a recoverable "cost"

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[7] The text of 28 U.S.C. §1927 is set out in the appendix.

[8] The text of 28 U.S.C. §1920 is set out in the appendix.

of litigation, Rule 54(d) was not intended to govern a post-judgment motion for attorney's fees. *Id.*, *p*54.77(2).

The *Roadway* Court also declined to read the provisions of the Fees Act into 28 U.S.C. §1927, and held the act inapplicable as it did not relate to attorney conduct. However, the Court noted:

> "The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy. Unlike §.927, both §1988 and §2000e-5 (k) restrict recovery to prevailing parties." *Roadway* at 762.

The Fees Act therefore treats prevailing plaintiffs and defendants differently, a distinction which encourages suits by victims while deterring frivolous litigation. The Court rejected the contention that §1988 supplanted the cost concept established by §1920 and §1927. *Id.* at 763.

Although not precisely on point with the timeliness issue in this case, *Roadway* establishes several controlling principles. Fees are not included within the meaning 28 U.S.C. §1920. As such, a motion for award of fees under 42 U.S.C. §1988 cannot be considered to be a request for costs under Rule 54(d). In interpreting the Fees Act, consideration must be given to the treatment of "fees" and "costs" at the time the statute was enacted. Under the American Rule, fees were considered wholly apart from costs, and were not recovered unless authorized by statute or some exception. *Alyeska*, 421 U.S. 240 (1975). Congress passed the Fees Act solely to meet the technical requirements of *Alyeska*, but not to create startling new remedies. S.REP. No. 94-1011, 94th Cong., 2d Sess. (1976). Congress intended to promote private litigation of civil rights cases by allowing the remedy of recovery of attorney's fees in addition to costs which ordinarily would be recovered. Congress, by specifically adopting existing case authority, preserved the existing distinction between fees and costs. To interpret the Fees Act as petitioner suggests would eliminate the distinction Congress recognized and would be contrary to this Court's holding in *Roadway*.

Indeed, in *Roadway* a remedy was suggested to the Congress: the language of §1927 or §1920 could be altered to specifically allow recovery of attorney's fees. *Roadway* at 760, n.8. Heeding this advice, Congress amended 28 U.S.C. §1927 in 1980 to provide that counsel's liability for excess costs also included liability for attorney's fees. Significantly, Congress chose not to broaden the definition of costs under 28 U.S.C. §1920, which would have ensured the applicability of Rule 54(d) to a request for attorney's fees.

The general distinction between costs and fees thus survives, as do the policy reasons for the distinctions. Fee awards are likely to be disputed, depend upon the exercise of the court's discretion, and must be evaluated in light of several criteria. Costs, on the other hand, can be expeditiously determined as a matter of routine, can be awarded without controversy, and usually without the necessity of a hearing. Rule 54(d) is tailored to these principles, as is Rule 58. Costs, not being a matter of controversy or a great burden to the party taxed, but rather of a more predictable nature, may be recovered in the absence of time limitations, and the judgment obtained need not be delayed for the taxing of costs. In a sense then, costs are always "reasonable" and do not need judicial review to protect the party taxed. To hold that fees are governed by Rule 54(d) would unnecessarily blur the obvious differences between fees and costs, and would apply Rule 54(d) to a complex matter to which it was not intended to apply.[9]

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[9] Petitioner cites *Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980) and *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980) as support for his view that Rule 54(d) governs a motion for fees under 42 U.S.C. §1988. *Bond*, citing *Knighton*, viewed 54(d) as controlling its decision that fees motions under §1988 would be disposed of under Rule 54(d). *Bond* at 1234. The Seventh Circuit, unlike the First Circuit in *White*, 629 F.2d 697 (1980), or the Fifth Circuit in *Knighton*, included very little analysis of the issue, apparently choosing to ride on *Knighton's* coattails.

Knighton considered the fees issue from a perspective different from *White*: fees motions, it determined, were unlike a motion to

B. A Motion for Attorney's Fees Under 42 U.S.C. §1988 After Final Judgment Seeks a Fundamental Alteration of the Prior Judgment and is Therefore Governed by Rule 59(e).

1. The consent decree entered below was the final judgment in this case, and could be modified only as allowed by rule 59(e).

As the *White* court stated, 629 F.2d at 702, 703, a motion for attorney's fees after *final* judgment is governed by Rule 59(e). A §1988 fees motion after a final judgment could result in substantial additional liability to a losing party after all aspects of the litigation are otherwise terminated. The key to this analysis is the "finality" of the judgment. If the judgment is not final because issues or claims for relief are left unresolved, *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976), Rule 59(e) is simply inapplicable. Petitioner, however, confuses this issue when he mingles the concepts of finality and appealability.

Whether a court order is appealable under the applicable provision of 28 U.S.C. §§1291 *et seq.* is not necessarily related to whether an order is final for the purposes of Rule 59(e).

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alter or amend a judgment under Rule 59(e), but rather sought merely to obtain what was due because of the judgment. *Id.* at 797. Consequently, there was no time limit on a fees request under the Fees Act. However, the Fifth Circuit, in a previous case, held that the term "costs" did not include attorney's fees, and that such motions must comply with Rule 59(e). *Stacy v. Williams*, 446 F.2d 1366 (5th Cir. 1971). The *Stacy* court noted that a request for fees was in effect a request for new relief, and the provisions of Rule 59(e) were "particularly applicable." *Id.* In *Knighton*, the Court of Appeals distinguished *Stacy* as representing the rule to be followed in "bad faith" cases. In such cases, fees should be sought as part of the litigation itself. The *Knighton* court did recognize that this internal conflict in the Fifth Circuit on the award of attorney's fees created a problem, but the problem could be solved by local rule. *Id.* at 798, n. 2. As does the First Circuit in *White*, at 702, respondents respectfully disagree with the *Knighton* court. Not only does the *White* court establish a sounder rule, but it recognizes the practical distinctions between fees and costs.

An order or judgment is final for the purposes of Rule 59(e) when it

> "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Gurule v. Wilson*, 635 F.2d 782, 786 (10th Cir. 1980).

A judgment which does not adjudicate all pending claims for relief, including an unresolved claim for attorney's fees, is not a final judgment for the purposes of Rule 59(e). *Gurule, supra; Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977); *cf. Liberty Mutual v. Wetzel, supra.* In the absence of a *final* order, Rule 59(e) does not apply. A fee request is thus not subject to Rule 59(e) until a *final* judgment adjudicating all issues and claims is entered. Petitioner's suggestion (brief at 34-36) that several independent requests for attorney's fees will have to be made each time an order adjudicating a certain aspect of the litigation is entered is incorrect. Such interim orders are not subject to Rule 59(e) as they do not fully adjudicate all claims and issues before the court.[10] Although sound practice would normally call for a prayer for fees at the outset of the litigation, Rule 59(e) does not bar a motion for fees by a prevailing party until ten days after final resolution of all claims and issues in the suit. Indeed, application of the rule gives the party who initially failed to affirmatively seek a fees award a second chance to obtain the relief.

In the case at bar, there was unquestionably a final judgment. Upon respondents' request (J.A. 29), the First Circuit remanded the case to the district court for the purpose of

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[10] There are limited exceptions to the general rule that fees will not be awarded until after a final judgment is entered. These cases generally involve protracted litigation where delay of the award may impose hardship. District courts may in such cases award fees and costs incident to disposition of interim matters. *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 723 (1974); *accord, Hanrahan v. Hampton*, 446 U.S. 754 (1980). However, failure to ask for fees at the time of an interim order does not preclude a request for fees for the entire litigation by the prevailing party at any time before final judgment is entered, or within ten days thereafter. F.R.Civ.P. 59(e).

entertaining a consent decree (J.A. 30). The parties signed the consent decree on December 8, 1978 (J.A. 45), and judgment was entered on January 26, 1979 (J.A. 33). The petitioner's original complaint made no claim for fees (J.A. 5-15) and likewise the consent decree made no mention of attorney's fees (J.A. 31-32). Thus, not only did the consent decree fully and finally adjudicate all issues raised in the litigation, it implicitly embodied the parties' *agreement* that the matter was fully and finally resolved through entry of the consent decree. Even though petitioner failed to take advantage of the six weeks between signing the consent decree and entry of judgment to resolve the fees issue, he had an additional ten days after entry of the judgment to file a formal motion with the district court. Petitioner's counsel clearly had this matter in mind on January 31, 1979 — five days after entry of judgment — when he drafted a fees request letter to respondents' counsel. J.A. 45. Petitioner cannot now argue that application of Rule 59(e) is unduly burdensome. A timely motion to the court giving notice of the fees claim is all that was required to protect his fees request under 42 U.S.C. §1988. As the First Circuit noted:

> "We add that we see our decision as imposing no great hardship on civil rights litigants or courts. Doubtless persons such as the present litigants who have acted prior to this decision have greater cause for complaint than will those who follow them, but most fees litigants who have previously come to our attention have taken pains to request fees prior to or within ten days following entry of judgment, . . . the state of the law has surely been such as to suggest the wisdom of that course." 629 F.2d at 704 (citations omitted).

2. Rule 59(e) applies to all motions to alter or amend a judgment, including a new claim for substantive relief.

Petitioner suggests that Rule 59(e) should be narrowly read to encompass only motions requesting a court to correct errors of law (brief at 28-29). This argument is based on the theory that the rule was only intended to clarify the situation described in *Boaz v. Mutual Life Insurance Co. of New York*, 146 F.2d 321 (8th Cir. 1944), which held that the district court

had the inherent power to entertain a post-judgment motion to correct an error. This view unreasonably constricts the scope of Rule 59(e) and fails to give due consideration to the broad application of the rule to "a motion to alter or amend the judgment."[11] In this case, petitioner plainly sought to alter or amend the judgment by, for the first time, seeking substantial new relief. This motion for fees flowed from the

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[11] Cases cited by the petitioner to defeat applicability of Rule 59(e) have no application to the procedural posture of the instant case. *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944) was handed down prior to the promulgation of Rule 59 and asserts the court's inherent power to correct errors or omissions. The remaining cited cases merely recite examples of Rule 59(e)'s applicability in situations wholly dissimilar to the instant case. *See, e.g., Continental Casualty Co. v. American Fidelity and Casualty Co.*, 186 F.Supp. 173 (S.D. Ill. 1959), *aff'd*, 275 F.2d 381 (7th Cir. 1960) (Rule 59(e) applicable to motion to vacate judgment for misconstruction of state law and misinterpretation of insurance policy provision); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978) (motion for rehearing or reconsideration of order denying stay of execution of writ of *habeas corpus* is governed by Rule 59(e)); *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 68 L.Ed.2d 213 (1981) (court specifically reserved question of fees for further disposition); *Tucker v. Reading Co.*, 335 F.Supp. 1269 (E.D.Pa. 1971) (motion to vacate order as to third-party liability for contribution is governed by Rule 59(e)); *Maryland Tuna Corp. v. MS Benares*, 429 F.2d 307 (2d Cir. 1970) (motion to "re-settle issues" is a motion governed by Rule 59(e)); *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir. 1971) (motion to vacate order of dismissal is governed by Rule 59(e)); *Seshachalom v. Creighton University School of Medicine*, 545 F.2d 1147 (8th Cir. 1976), *appeal dismissed on other grounds*, 549 F.2d 79 (8th Cir), *cert. denied*, 433 U.S. 909 (1977) (motion for new trial governed by Rule 59(b) and motion for extension of time to file notice of appeal is governed by 59(e)); *Sack v. Low*, 478 F.2d 360 (2d Cir. 1973) (motion to vacate finding as to choice of law for limitation of action is governed by Rule 59(e)); *Rodgers v. Conemough & Black Lick R.R. Co.*, 137 F.Supp. 467 (W.D.Pa. 1956) (motion to reform verdict is governed by Rule 59(e)); *Consor v. Occidental Life Insurance Co. of California*, 469 F.Supp. 1110 (N.D. Tex. 1979) (motion to vacate judgment as to

main body of the action previously thought to be resolved in the January 26 judgment, and sought to impose a substantial new liability on the respondents. 629 F.2d at 703, 704; *accord, Gurule v. Wilson,* 635 F.2d 782 (10th Cir. 1980); *Hirschkop v. Snead,* 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981).

Petitioner's failure to raise and resolve the fees issue, a remedy available to him as a central part of the underlying cause of action, prior to the entry of final judgment precludes his late assertion of the remedy outside of the time period allowed for altering or amending the judgment. Rule 59(e) must apply, as otherwise civil rights litigants will be unsure as to the finality of judgments against them. Otherwise, final judgments might be reopened at any time for the purpose of imposing substantial new liabilities flowing from the cause of action previously thought to be resolved.

3. Rule 59(e) applies to a post-judgment motion for attorney's fees unless the particular request for fees comes within a recognized exception to the final judgment rule.

An award of attorney's fees is usually viewed contemporaneously with the merits or conduct of the underlying action. Parties who seek such awards must do so prior to entry of final judgment or within ten days thereafter as allowed by Rule 59(e), unless otherwise excepted.[12] There are two exceptions to this general rule. The first is when an

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class claim is governed by Rule 59(e)); and *Chi-Mil Corp. v. W.T. Grant Co.,* 422 F.Supp. 46 (E.D.Wis. 1976) (motion to amend judgment ordering specific performance of contract is governed by Rule 59(e)). Impressive as the list of authorities appears at first, not one case indicates that Rule 59(e) is inapplicable to a motion for fees under §1988. And even taken together, the cases do not preclude applicability of Rule 59(e) to a fees motion.

[12] *See, Stacy v. Williams,* 446 F.2d 1366 (5th Cir. 1971) (fee award based on bad faith of counsel must be requested within time period allowed by Rule 59(e)); *Gurule v. Wilson,* 635 F.2d 782 (10th Cir. 1980) (§1988 fee request must be made as provided in Rule 59(e)).

attorney seeks to enforce a right of his own, *cf. Dietrich Corp. v. King Resources Co.*, 596 F.2d 422 (10th Cir. 1979), and the second is when a party seeks reimbursement for fees out of a common fund, *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). The case at bar does not involve an attorney's assertion of his own right. The Fees Act states "... the court, in its discretion, may allow the *prevailing party* ..." a reasonable attorney's fee. Only a party, then, may seek a fees award. The question remains whether an attorney's fee award comes under the "common fund" exception to the final judgment rule.

The common fund theory allows an award of attorney's fees out of a fund created by litigation intended for distribution to a class, which is benefited thereby. Fees are generally awarded to the successful plaintiff to avoid unjust enrichment of the benefited class at plaintiff's expense. A variation of this theory was discussed in *Sprague v. Ticonic National Bank*, 307 U.S.161 (1939). In *Sprague*, the efforts of a successful plaintiff established as a matter of law a right of recovery for other similar plaintiffs from assets of the defendant. This Court had before it the question of whether the lower court had the general equitable power to entertain a petition for allowance of fees "as between solicitor and client." *Sprague* at 167. The issue of fees "as between solicitor and client" was not in issue in the underlying proceeding as the plaintiff sought recovery not from the losing defendant, but from the common assets to be shared with the common beneficiaries. *Id.* at 168. The issue of fees between the plaintiff and the common beneficiaries was not foreclosed by the original proceeding and could be determined in a separate proceeding. *Id.* at 170. In other words, recovery from the common fund imposed no additional burden on the losing defendant and was collateral to the original action. The defendant thus had no interest in recovery of attorney's fees from the common fund.[13] *Sprague* does not therefore sup-

[13] A different situation was considered in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In that diversity case, a

port the general proposition that an award of attorney's fees is independent of the merits of the underlying case.

This difference between the common fund theory and an award of fees under the Fees Act is further illustrated by *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). In *Mills*, a shareholder derivative suit, this Court elaborated on another variation of the common fund concept. Reimbursement of fees may be allowed where plaintiff's efforts confer a substantial benefit on a class even though there may not be a specific fund created by the suit. *Id.* at 392-395.

> "To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action *is not to saddle the unsuccessful party with the expenses* but to impose them on the class which has benefited from them and that would have had to pay them had it brought the suit." *Id.* at 396-397 (emphasis added)

The adversary party has no interest in the award of fees from the "common fund", as once it is identified, he has no interest in its distribution. The reimbursement of the plaintiff's fees from the fund prevents unjust enrichment of the benefited class and serves to proportionately spread the costs of litigation among those benefited. *Boeing* at 478. Distribution of the fund does not increase the losing defendant's exposure, *Id.* at 479, n. 5, and is consistent with the American

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New Jersey statute granted the right to a corporate defendant in a shareholder derivative suit to obtain "security" from a minority shareholder plaintiff. In *Cohen*, the federal district court refused to apply the statute and the corporate defendant immediately appealed the denial. This Court held that review of the denial of the statutory right after trial would be too late to prevent loss of the right to the defendant. *Id.* at 546. The Court said that the claimed right was appealable in advance of trial as it fell within a small class of claims which were collateral to the main dispute, and which could be determined independently of the merits. *Id.* This case does not stand for the general proposition suggested by petitioner in his brief at 33, that fee awards are separate from the merits of the case. Indeed, in *Cohen*, fees were not specifically in issue.

Rule against taxing the losing party with the victor's fees. *Id.* at 481.

A fee award under the Fees Act, however, has a direct and substantial impact on the losing party. Such awards can be significant, as in the case at bar where the district court awarded an amount in excess of $16,000 (J.A. 74-80). A fees award under §1988 is paid by the losing party, who obviously has a compelling interest in the amount of the award. The considerations supporting the common fund exception consequently do not apply to an award of attorney's fees under §1988. In fact, most common fund cases deal with economic litigation such as derivative suits. They cannot sustain an exception to the finality of judgment rule for fees awards under 42 U.S.C. §1988.

4. A motion for fees under 42 U.S.C. §1988 is directly related to the merits of the underlying cause of action.

The language of the Fees Act ties a motion for attorney's fees directly to the underlying cause of action in two respects. First, the statute provides that "in any action or proceeding" the court may, in its discretion, allow "to the prevailing party" a reasonable attorney's fee. The "in any action or proceeding" language

> "strongly indicates that the fee issue is one properly viewed as belonging within the main body of the already commenced civil rights action." *White*, 629 F.2d at 704.

Second, the statute allows fees to the "prevailing party," indicating that the fees award must, of course, be determined by reference to the party's success on the merits of the main action. This is consistent with the policy behind these and similar civil rights fees statutes of promoting private litigation of meritorious causes of action. *See e.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). As Congress intended to promote meritorious causes of action, it intended that reasonable awards be made in light of the substantive merit of the underlying claim.

> "The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrim-

> ination policy. Unlike [28 U.S.C.] §1927, both [42 U.S.C.] §1988 and [42 U.S.C.] §2000e-5(k) restrict recovery to prevailing parties." *Roadway Express Inc. v. Piper*, 447 U.S. 752, 762 (1980); *accord, Hirschkop v. Snead*, 475 F.Supp. 59 (E.D.Va. 1979), *aff'd on other grounds*, 646 F.2d 149 (4th Cir. 1981).

See also, Gurule v. Wilson, 635 F.2d 782, 787 (10th Cir. 1980) (an award of attorney's fees is an "integral part" of a §1983 action); and *Richerson v. Jones*, 551 F.2d 918, 922 (3rd Cir. 1977) (request for attorney's fees is not collateral to the main action).

Accordingly, as noted in *Hirschkop* at 62 and *White* at 700, the weight of authority in considering motions for attorney's fees made in various contexts favors the application of Rule 59(e). *See, e.g., Fase v. Seafarers Welfare & Pension Plan*, 79 F.R.D. 363 (E.D.N.Y. 1978), *aff'd on other grounds*, 589 F.2d 112 (2d Cir. 1978); *Stacy v. Williams*, 446 F.2d 1366 (5th Cir. 1971); *Glick v. White Motor Co.*, 317 F.Supp. 42 (E.D.Pa. 1970), *aff'd on other grounds*, 458 F.2d 1287 (3rd Cir. 1972); *DuBuit v. Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976); *Hill v. TVA*, 84 F.R.D. 226 (E.D.Tenn. 1979); *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980).

Other courts have reached the opposite conclusion. Yet, in so doing, difficulties are frequently encountered in wrestling with the fundamental unfairness of the result, leaving a losing party exposed to liability for potentially large fee awards for indefinite periods of time. *See Obin v. District No. 9 of the Int'l Ass'n of Machinists*, ___ F.2d ___, 49 U.S.L.W. 2814 (8th Cir. June 11, 1981) (No. 80-1315). *Obin* agreed with the First Circuit that attorney's fees are substantively different from costs under Rule 54(d), but disagreed with the First Circuit's application of Rule 59(e) because a request for fees was a "collateral and independent claim". *Id.*, slip op. at 12n.7, 19. In reaching this decision, the *Obin* court cited *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). For the reasons cited in part B.*3* above, the respondents respectfully submit that *Obin's* reliance on *Sprague* is misplaced and that its holding that a fees award is collateral is thereby flawed. Even

though *Obin* concluded that the fees issue is collateral, it expressed

> "... a real concern over the fragmentation of appeals. In the interests of orderly and expeditious consideration of all issues arising from a single lawsuit, disputes on appeal over the merits, as well as disputes regarding the allowance of attorneys' fees to a prevailing party, should ordinarily be considered and decided by this court in either a single or consolidated appellate proceeding. This court deems it essential that all district courts follow a consistent practice of promptly hearing and deciding attorneys' fees claims in civil rights and other cases so that any appeal by an aggrieved party from the allowance or disallowance of fees can be considered by this court together with any appeal taken from a final judgment on the merits." *Id.* at 17.

The court suggested that the district courts meet this objective through a local rule requiring a motion for fees be made within twenty-one days of judgment. *Id.*

The *Obin* decision, which rejected the application of a *federal* rule to an attorney's fees motion, nevertheless recognized the chaos that would result from the application of *no* rule. Finding upon a false premise that a fees award was collateral, *Obin* chose to reject Rule 59(e). The resulting vulnerability of otherwise final judgments prompted the court to require some uniformity through the application of various local rules. Recovery of attorney's fees in a civil rights action, however, involves consideration of important national policies. Resolution of the timeliness issue must not be left to the proclivities of various district courts.[14] Fees motions must be determined by a rule of national application.

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[14] Interestingly, petitioner seems to agree with the need for a "uniform procedural approach to fee requests." Brief at 20-21, n. 16. The "uniform" approach petitioner suggests is a "flexible" one based on "the equitable doctrine of laches." This approach, however, would appear to do little to promote nationwide uniformity.

The rationale of the First Circuit is therefore sounder, as it subjects fees requests to a uniform, national, rule.[15]

5. Application of Rule 59(e) is fair, ensures certainty of final of judgments, and will discourage piecemeal litigation of civil rights cases.

Rule 59(e) provides a prevailing litigant with a second opportunity to obtain an award of attorney's fees. The rule will operate only in a situation where the litigant has failed or neglected to make a request for fees prior to entry of the final judgment. Where a pre-judgment request for fees has been made, the remedy has been preserved, and the judgment will not be final until the request is resolved. Rule 59(e) thus gives a prevailing party a second chance to overcome his previous failure to ask the court to award him attorney's fees.[16]

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[15] *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980) is cited for the proposition that a fees award under §1988 is a collateral matter. The Seventh Circuit did in fact reach that conclusion, *Id.* at 33, but only in the context of whether a fees award was appealable. Rule 59(e) was not in issue, especially since the prevailing party properly made his fees motion within nine days after entry of judgment, well within the jurisdictional limitation of the rule. *Id.* at 32. Even though it determined that a fees award was collateral, the court stated that the issue was best determined in light of the relative merit of the underlying case. It is thus advantageous, the court said, to quickly review a fees request, *Id.* at 34, as considerations governing the award — such as the relative merit of both parties' positions, competence of counsel, reasonableness of time sheets — are best determined contemporaneously with the merits. *Id.* Although not addressing the timeliness issue directly, the court implied that fee requests must at the very least be made expeditiously. This is, of course, the very desirable result the application of Rule 59(e) ensures.

[16] Two district courts have recognized the reasonableness of a ten-day rule governing fee motions since the time of the First Circuit decision in *White: Bryant v. International Schools Services, Inc.*, 502 F.Supp. 472 (D.N.J. 1980), suggesting observance of ten-day rule even though not established as rule in Third Circuit; and

The rule also assures fairness to the losing party. If a fee request could be made at any time after entry of final judgment, the losing defendant could never be confident of the validity and finality of the prior judgment. He would be exposed, theoretically forever, to a belated request for fees arising out of an action that was presumably terminated in the previous "final judgment." This protracted exposure to substantial new liability is contrary to the sound policy of finality of judgments and the fair expectation of the parties that a judgment terminates all matters relating to a particular lawsuit.

Swift adjudication of a post-judgment fees request has the added benefit of allowing the court and the parties to resolve the issue while memory of the merits of the underlying action and relative reasonableness of the parties' litigation stance is still fresh. This is particularly helpful to the court which must carefully weigh the fees request. Delaying the fees motion unreasonably complicates proof of the fee claim, which will additionally burden the court's limited time resource.

Suzuki v. Yuen, 507 F.Supp. 819 (D. Hawaii 1981) citing *White* and asserting in a footnote at 507 F.Supp. 821 that Rule 59(e) applies to fee motions under §1988. The purpose of the ten-day limitation expressed in Rule 59(e) is to assure timely submission of judicial business; it is not to require settlement of the issues raised in the motion within ten days of judgment. Fee requests in particular are susceptible to early submission to the court. *Perkins v. Standard Oil Co. of Calif.*, 399 U.S. 222 (1970) (motion filed during course of litigation); *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1974) (motion made prior to final order entering consent decree; *See* trial decision, 376 F.Supp. 483 (N.D.Ohio 1973)). Fee requests have been made as a part of the pleadings as well. *See, e.g., Detroit v. Grinnel Corp.*, 495 F.2d 448 (2d Cir. 1974) (Clayton Act); *Richerson v. Jones*, 551 F.2d 918, 922 (3rd Cir. 1977); *Anderson v. Morris*, 500 F.Supp. 1095, 1105 (D.Md. 1980); *Gurule v. Wilson*, 635 F.2d 782, 787 (10th Cir. 1980); *Johnson v. University of Bridgeport*, 629 F.2d 828, 829 (2d Cir. 1980); and *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

The First Circuit decision also encourages the parties to "face up" to the issue of fees. 629 F.2d at 705. Nothing can be gained by ignoring the reality of the existence of the fees issue in a §1983 action and parties may, in a settlement context, be able to resolve the issue. If parties are unable to agree on the fees issue, nothing is to prevent them from agreeing to a consent decree which resolves the merits and specifically reserves the fee issue for a judicial determination. In this fashion, the parties can achieve relatively quick agreement on the underlying cause of action.

> "Entry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option when time is of the essence. Such a judgment might raise a question of finality should an appeal immediately be taken, [citation omitted] but even if non-appealable because still interlocutory the judgment would otherwise be effective. And the district court has the means to ensure, when necessary, the appealability of such a judgment. Under Fed.R.Civ.P. 54(b) the court may direct the entry of final judgment forthwith upon fewer than all claims presented upon determining expressly that there is no just reason for delay. Thus under our present decision the district court retains ample flexibility. Our decision merely ensures that fees, like all other matters in controversy, will be covered by a unified judgment which, absent express action under Rule 54(b), controls the entire case." *White* at 705.

The decision below recognizes the practical realities of settlement, and allows a flexible approach to settlement by the parties and the court. The prevailing litigant is not locked into a procedural straightjacket as petitioner suggests. The prevailing party has ample flexibility to attempt to resolve the issue in settlement or raise the issue after settlement by putting the adverse party on notice, within ten days after judgment, that he intends to obtain a fees award. To the extent the movant is unable to compose a complete submission within ten days after judgment — and in this case, petitioner had over six weeks to prepare the submission prior to entry of judgment — he may simply file a notice motion with

the court which will preserve his request. This submission sufficiently complies with Rule 59(e) and is further consistent with its policy of prompt notification of a request which alters or amends a judgment. The issue, thus reserved, can be determined in a subsequent court hearing, at which time the parties would present their evidence.

The subsequent hearing is the forum for proof of the claim, and its timing would no doubt be sensitive to the needs of both parties to prepare their respective submissions. Such hearings would obviously not occur on the tenth day after entry of judgment, and the prevailing party need not be ready to litigate the claim on the tenth day. While not forcing the prevailing party to immediately litigate the fees issue, the First Circuit decision does ensure that the fees request, once moved under Rule 59(e), will be heard and determined within a reasonable time after entry of judgment. And to the extent this rule promotes prompt review of fees requests, it also avoids the problem of piecemeal litigation by ensuring that the fees issue be resolved contemporaneously with entry of final judgment. This approach, with the added flexibility Rule 59(e), is sensible and fair to both parties.

This approach is also consistent with the policy of encouraging private litigation of civil rights cases. It does not prevent successful litigants from recovering attorney's fees. It provides a second shot for the litigant who fails to attempt resolution of the issue before final judgment. The First Circuit decision merely subjects these litigants to the same rules of finality of judgments which govern all other litigants. The result is fair. It applies a reasonable rule that allows uniformity of treatment of judgments, under which *all* litigants are treated alike.

II. THE FIRST CIRCUIT DECISION DOES NOT REQUIRE SIMULTANEOUS NEGOTIATION OF THE MERITS AND OF FEES AND THEREFORE CREATES NO ETHICAL CONFLICT.

The First Circuit realized that there is nothing wrong "with requiring the parties to face up to the issue of fees in

their settlement negotiations." 629 F.2d at 705. The question of fees is so integrally related to the merits that it is almost impossible for the parties not to look at the fees question, and the decision of the First Circuit merely requires the parties to timely confront the issue. Failure to do so, reasoned the court, calls the entire settlement into question. Although the *White* court required the parties to "face up" to the issue of attorney's fees, it did not require, nor did it suggest, simultaneous negotiation of the fee award. The First Circuit points out that no ethical problem need exist, nor is one intended, by its decision:

> "We of course do not suggest that an attorney in the course of settlement negotiations need, or in every case properly may, hold out, against his client's best interests, for a specific fees award to be included in the consent decree. If agreement as to fees is not easily accomplished, the parties may provide for submission of the entire question of fees to the court . . ." *Id.*

The approach encouraged by the First Circuit is analagous to the conventional practice in settlement of money damages and attorney's fees. In *McDonald v. Chicago Milwaukee Corp.*, 565 (F.2d 416 (7th Cir. 1977), a class action brought by holders of railroad bonds and debentures, settlement was reached by creation of a fund for a subclass of former debenture holders. Attorney's fees, in the understanding of the litigants, were to be paid out of this fund. The court rejected the argument that the class attorney wrongfully negotiated simultaneously for the fund and for individual counsel fees, and the settlement was upheld.

The *McDonald* court reasoned that any amounts of money to be paid to the prevailing litigants were properly part of the settlement fund, and that they should be known and disclosed during settlement. Unless the defeated party is aware of the extent of its potential liability to the prevailing party, neither the defeated party nor the court can make an intelligent judgment as to the fairness and reasonableness of a proposed settlement. *Id.* at 423. This approach requires only *disclosure* of liability for fees. It does not require negotiation

of damages simultaneously with negotiation of individual counsel fees, and the court in fact recognized simultaneous negotiation as presenting an inherent conflict of interest as to the prevailing litigant's counsel. Because the appellate court found no evidence that improper negotiation had taken place, it refused to disturb the judgment, noting that a decision whether to accept or reject a settlement offer is a business judgment made by the parties, for which the court's business judgment is not to be substituted. *Id.* at 426-427.[17]

Settlements of attorney's fees in antitrust cases are also commonplace. In *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), the settlement provided for the payment of $1.25 million in attorney's fees in the court's discretion. *Grunin* was a class action brought under the Sherman and Clayton antitrust acts, seeking injunctive relief, treble damages, and attorney's fees, as provided by the statutes, 15 U.S.C. §§1, 2 and 14. Award of fees has become an integral part of antitrust litigation, and as *Grunin* recognizes, disclosure of liability for payment is consistent with sound settlement practice. The question of fees is also an integral part of all civil rights litigation. As the First Circuit states in its *White* opinion,

> "Where Congress has spoken on the subject of fees, there can be no virtue in pretending the issue does not exist." 629 F.2d at 705.

The approach followed by the First Circuit harmonizes with *Prandini v. National Tea Co.*, 577 F.2d 1015 (3rd Cir.

[17] It is not uncommon for settlement agreements to make provisions for attorney's fees. As a practical matter, a provision that fees and expenses of plaintiff's counsel be paid separately by the defendants over and above the settlement is generally disapproved. *See* 1 (Pt. 2) MOORE'S FEDERAL PRACTICE, *Manual for Complex Litigation*, *p*1.46 (2d Ed. 1980). Paragraph 1.46 of the *Manual* suggests disclosure of both damages and attorney's fees to secure district court approval of class action settlements pursuant to Rule 23(e) and indicates that failure to address the issue of attorney's fees may be improper.

1977), and *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 66 L.Ed.2d 83 (1980). The Third Circuit in *Prandini* noted with approval the desirability of settlements, as opposed to protracted litigation. In order to encourage settlement without compromising the plaintiff's rights, the *Prandini* court held that the trial court should insist upon two separate settlements, the first being the damage aspect of the case, the second concerning the awarding of attorney's fees. The court noted that

> [o]nly after court approval of the damage settlement should discussion and negotiation of appropriate compensation for the attorneys begin." 577 F.2d at 1021.

Mendoza adopts a similar procedure. As a practical matter, however, this dual approach need not be *required* in every class action settlement. A broad prohibition of negotiation of a fee award in a settlement context is neither necessary or desirable.[18] If the parties are able to settle both the merits and the fees issue in their negotiations, that approach should be encouraged. Protection is provided by court review and approval of the consent decree.

The *White* court, by merely requiring parties to "face up" to the fees issue, did not create an ethical problem. The decision does not require that the parties *settle* the fees issue. It only requires that parties *consider* the issue. The First Circuit provides a safety valve by allowing the parties, if they are unable to reach agreement on fees, to reserve the fees issue for a subsequent hearing by the court. 629 F.2d at 705. This is entirely consistent with the procedure suggested by *Prandini*, and avoids the conflict that may occur if the parties are required to settle the fees issue, a result which is not intended or directed by the First Circuit.

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[18] The Third Circuit has declined to broadly apply *Prandini*. In *Shlensky v. Dorsey*, 574 F.2d 131 (3rd Cir. 1978), it refused to apply the *Prandini* principle in a stockholder's derivative suit. While deciding to apply the same criteria as to amount of fees in both class action and derivative suits, the court refused to insist on a bifurcated approach to settlement.

The *White* decision focuses on the timeliness of a fees motion. This practice promotes fairness to all parties to the litigation. Consideration of the fees issue in settlement promotes fairness by putting the adversary party on notice as to his potential liability for fees. As the First Circuit noted, failure to reveal intentions concerning a fees request itself casts a shadow upon a settlement agreement. *Id.* By encouraging full disclosure by both parties in negotiations and by providing a means for subsequent determination of a fees request, the approach of the *White* court resolves, rather than creates, potential conflict. The decision encourages termination of litigation in an environment of full and fair disclosure, permitting counsel for each side to represent the best interests of the client while protecting the integrity of the adversary process.

CONCLUSION

For the foregoing reasons, the decision of the First Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

28 U.S.C. §1927:

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

28 U.S.C. §1920:

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD H. WHITE, *Petitioner*,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*, *Respondents*.

On A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-5887

RICHARD H. WHITE, *Petitioner*,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*, *Respondents*.

On A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY BRIEF FOR PETITIONER

STATEMENT

Petitioner has filed this Reply Brief primarily to point out that certain concessions made by respondents make Rule 59(e) wholly inapplicable to the fee request in this case. Most pertinent is respondents' concession that there is no final order to which Rule 59(e) of the Fed. R. Civ. P. can apply where an attorney's fee request is raised formally in a pleading or otherwise informally and remains unresolved following a judgment on the merits of a case.

On the ethical issue, petitioner particularly wishes to bring to this Court's attention the fact that the Committee on Professional and Judicial Ethics of the New York City Bar Association recently ruled that simultaneous negotiation of the merits and of statutorily authorized fees is unethical.

ARGUMENT

I. A Request For Fees Is Not And Cannot Be Subject To Rule 59(e) In View Of The Language Of The Fees Act, Of The Nature Of A Fee Determination As Analyzed In This Court's Decision In *Sprague*, And Particularly Of The Concessions In The Brief For Respondents

A. Faced with Congress' chosen language in the Fees Act authorizing courts to allow "a reasonable attorney's fee as part of the costs," respondents raise several arguments about why this should not be so. [1] Respondents' arguments are singularly unpersuasive.

After asserting that the language of the Fees Act essentially was borrowed from the fee authorization in Title II of the Civil Rights Act of 1964, respondents curiously rely on a statement in the Senate Report accompanying the Senate Bill which did not become Title II for the proposition that attorney's fees were not independently available under Rule 54(d) of the Fed. R. Civ. P. without a statutory authorization of fees. *See* Resp. Br. at 8 n.2. Whatever respondents' point may be here, it is important to recognize that the Senate Bill on Title II did not authorize fees at all, that § 204(b) of the House Bill changed matters by authorizing "a reasonable attorney's fee as part of the costs," that both the Senate and House Reports recognized that if fees were to be authorized they would be allowed as part of the costs, that the House Bill was enacted, and that Title II thus authorizes "a reasonable attorney's fee as part of the costs," 42 U.S.C. § 2000a-3. [2]

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[1] Omitted entirely from Respondents' Brief is any discussion about the contemporaneous understanding of the meaning of "costs" in Fed. R. Civ. P. Rule 54(d) at the time the rule was adopted. As is set forth in detail in the Brief for the Lawyers' Committee and for the Massachusetts Bar Association, Amici Curiae, at 9-12, the contemporaneous understanding was that statutorily authorized fees *were* part of the costs allowable under Rule 54(d). In this sense, the historical approach taken by this Court in *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), supports the petitioner here. *See also* Pet. Br. at 11-12 n.5.

[2] The Senate Report accompanying S. 1732 stated that an authorization of fees "is omitted from this bill," that attorney's fees without a statutory authorization "are not costs as that term is used in Rule 54(d)," and that, accordingly, "no attorney fees could be allowed either party under this bill as

Also relevant if not conclusive on the procedural meaning of Title II's fee authorization — and hence of the procedural meaning of the Fees Act — is *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402-03 (1968), where this Court in a unanimous per curiam decision adhered precisely to the intent of Congress and to the language used by Congress in directing that "the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents." [3] Since this Court's decision in *Newman* was repeatedly relied on in the legislative history of the Fees Act, *see* S. Rep. No. 94-1011, 94th Cong., 2d Sess., 3, 4 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 2, 6, 9 (1976), there can be no doubt that Congress meant what it said in the Fees Act: that fees are to be awarded "as part of the costs."

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part of the costs." S. Rep. No. 872, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. Code Cong. & Ad. News, 2355, 2360. The Senate Bill was not enacted.

The House Report accompanying H.R. 7152 pointed out that § 204(b) of the House Bill "permits the court in any action commenced pursuant to this title to allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* [1964] U.S. Code Cong. & Ad. News, 2391, 2396. The House Bill's authorization of "a reasonable attorney's fee as part of the costs" was enacted in the Civil Rights Act of 1964, Pub. L. No. 88-352, § 204(b), 78 Stat. 241, *reprinted in* [1964] U.S. Code Cong. & Ad. News, 287, 291.

[3] The trial court in *Newman* also was aware that counsel fees, if they were to be allowed, were to be awarded as part of the costs. After awarding judgment to the plaintiffs, but only in part, the trial court ordered that "costs exclusive of attorney's fees are hereby awarded to plaintiffs." 256 F.Supp. 941, 953 (D.S.C. 1966). Following an appeal to the Fourth Circuit *en banc* and to this Court involving the availability of fees, this Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," and thereby directed that "the District Court on remand should include reasonable counsel fees as part of the costs to be assessed against the respondents." 390 U.S. at 402-03 (1968).

B. In response to this Court's decision in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 170 (1939), holding that a fee request is "not a request for a modification of the original decree," respondents assert that *Sprague* should be limited to common fund cases on the ground that common fund defendants have "no interest" in common fund fee awards. Resp. Br. at 21, 22. The fallacy of this proposition not only is explained in Pet. Br. at 21-22 n.17, and not only is evident from the fact that common fund defendants repeatedly appeal fee awards, *see, e.g., Pitchford* v. *Pepi, Inc.*, 531 F.2d 92 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976); *cf., Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980), but in fact is admitted by respondents later in their brief when they refer to a common fund fee settlement as part of the losing defendant's "liability to the prevailing party," Resp. Br. at 30.

With their misplaced focus, respondents never attempt to distinguish the fact that "the inquiry [involved in making fee awards] is a collateral one, having a distinct and independent character" since "they are contingent upon the exigencies of equitable litigation." *Sprague* v. *Ticonic National Bank, supra*, 307 U.S. at 168-69; *see also, Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 723 (1974). And nowhere do respondents attempt to distinguish *Obin* v. *District No. 9 of the Int'l Ass'n of Machinists*, 651 F.2d 574 (8th Cir. 1981), where the Eighth Circuit properly followed this Court's analysis in *Sprague* applying it to a request for fees under the statutory authorization in Title VII and under the bad faith exception. *But see* the improper limitation in *Obin* discussed in Pet. Br. at 20-21 n.16. Respondents, in short, do not and cannot distinguish the analytic grounding of *Sprague*.

C. Addressing Rule 59(e), respondents attempt to support the First Circuit's decision by arguing that a fee award is an integral part of the merits of a case. Resp. Br. at 16-29. But, even assuming arguendo that fees are not an item of costs as specified by Congress and are not collateral to and independent from the merits as this Court held in *Sprague*, respondents' Rule 59(e) argument is not at all helpful. Nowhere do respondents provide any analysis of the origin, intended meaning, or ordinary application of Rule 59(e), *compare* Pet. Br. at 25-36, and nowhere do they apply such an analysis to this case.

Most surprisingly, respondents all but *concede* the inapplicability of Rule 59(e) to this case through their admission that fee requests involve subsequent evidentiary hearings, through their admission that Rule 59(e) does not apply to fee requests in which attorneys are asserting a right of their own, and through their admission that Rule 59(e) does not apply to an unresolved fee claim raised in the course of litigation.

1. Respondents candidly concede that a fee request, following a resolution on the merits, "can be determined in a subsequent court hearing, at which time the parties would present their evidence." Resp. Br. at 29. "The subsequent hearing is the forum for proof of the claim, and its timing would no doubt be sensitive to the needs of both parties to prepare their respective submissions." *Id.* It certainly is true, as the courts have widely recognized, that fee requests often involve separate evidentiary hearings. *See* Pet. Br. at 23-25. But it also is true that Rule 59(e) was *not* designed as a notice rule to initiate consideration of new evidentiary matters not previously presented to a court. *See* Pet. Br. at 25-36. Quite to the contrary, Rule 59(e), with its short time period and its suspension of judgment, does nothing more than allow a court to reconsider matters already fully presented. *Id.* [4]

2. Respondents also concede that Rule 59(e) is not applicable to a fee request "when an attorney seeks to enforce a right of his own." Resp. Br. at 20-21. This concession wholly undermines respondents' argument since respondents admitted in the trial court that "the attorneys' fees go to the attorneys directly." J.A. 88, and since the fee award here was made to petitioner's "counsel," *id.* at 80. This, in fact, is common practice. Although the Fees Act authorizes fees for a

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[4] Although subsequent evidentiary hearings are entirely inconsistent with Rule 59(e), it should be pointed out that the First Circuit itself discounted the actual and intended meaning of Rule 59(e) — which has been held to be jurisdictional, *see* Pet. Br. at 27 n.24 — by suggesting in dicta that "[e]ntry of judgment which determines all matters except fees and includes an express reservation of the issue of fees, is a possible option" to circumvent Rule 59(e). J.A. 106. This suggestion was recently followed in *Bacon* v. *Toia*, 648 F.2d 801, 809-10 (2d Cir. 1981), a case in which the Second Circuit rejected the application of Rule 59(e) to a fee request on this ground.

"prevailing party," and although fee requests under statutory authorizations as well as under the common fund theory are usually made in the name of the party, the courts have uniformly held that they also may be made *by counsel*, *see* Pet. Br. at 16 n.10, and they in any event are uniformly awarded *to counsel*, *id.* at 14-16. This reality, recognized and implemented by the courts, conforms with Congress' intent in enacting the Fees Act, *id.* at 34-35 n.30, 40. The intent that fees are to be awarded *to counsel* also is demonstrated by Congress' reliance on three illustrative fee computation cases, *see* S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976) with the court in each case having awarded fees expressly to the prevailing parties' "counsel" or "attorneys." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483, 486 (W.D.N.C. 1975); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 688 (N.D.Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (C.D.Cal. 1974).

3. Finally, respondents concede that "[a] judgment which does not adjudicate all pending claims for relief, including an unresolved claim for attorney's fees, is not a final judgment for the purposes of Rule 59(e)." *See* Resp. Br. at 17. "Where a prejudgment request for fees has been made, the remedy has been preserved, and the judgment will not be final until the request is resolved." *Id.* at 26. Respondents appear to contend that these concessions, which are based on several courts of appeals' decisions,[5] do not bar the application of Rule 59(e) to a case such as this either because petitioner's pre-Fees Act complaint did not expressly request fees in the prayer for relief, *id.* at 16-20, 26-29, or because there had been no action taken in this case "putting the adverse party on notice" of an intent to seek fees, *id.* at 28. Respondents seem to assert that in either situation, a judgment on the merits not addressing fees is somehow transformed into a final judgment for purposes of Rule 59(e).

There are two fatal defects in respondents' unique theory of notice pleading. First, under Rule 54(c), any failure to request fees in the ad

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[5] The courts of appeals' decisions — flowing from this Court's decision in *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976) — which support the proposition that a judgment is not final until there is a fee award are cited in Pet. Br. at 32-33 n.27, and in Resp. Br. at 17, 27 n.16. *See also Anderson* v. *Morris*, 658 F.2d 246 (4th Cir. 1981).

damnum clause of a pleading does not and cannot affect an entitlement to fees as part of the final judgment on the merits. Second, since respondents here were put on notice of the fee issue prior to settlement of the merits, the second part of their theory is not applicable to this case.

Rule 54(c) provides in relevant part: "Except as to a party against whom a judgment is entered by default, *every final judgment* shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings*." Fed. R. Civ. P. 54(c) (emphasis added). There is no dispute as to the meaning of this rule: "Rule 54(c) continues the story [of liberalized pleading under the Fed. R. Civ. P.] by providing that, except as to a judgment by default which shall not be different in kind from or exceed the amount prayed, every other final judgment shall grant the relief to which the party in whose favor it is rendered is entitled." 6 J. Moore, Federal Practice, ¶ 54.60, at 1212 (2d ed. 1981). Since "[a]n amendment of the prayer is not necessary to obtain the substantive relief to which the claimant is entitled," a party is entitled to receive relief in a final judgment quite different from that which was formally requested: "A party may be awarded damages even though equitable relief was prayed for; or may be granted equitable relief although money damages were prayed for; and the court may award equitable relief of a different nature than that sought by the prayer." *Id.* at ¶ 54.62, 1264, 1268-69 (footnotes omitted). Such additional relief unquestionably may include attorney's fees. *Id.* at 1271 n.31; *see Stroud* v. *B-W Acceptance Corp.*, 372 F.2d 185, 189 (10th Cir. 1967); *Paliaga* v. *Luckenbach Steamship Co.*, 301 F.2d 403, 410 (2d Cir. 1962). In fact, even a party that expressly waives a form of relief such as back pay is not barred under Rule 54(c) from later obtaining such relief. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 407, 423-25 (1975). "In brief, it is the duty of the court to grant the relief to which a party is entitled irrespective of the prayer for relief in the pleadings." 6 J. Moore, Federal Practice, ¶ 54.62, 1271 (2d ed. 1981). Since there was an entitlement to and an award of fees here, there thus was no final judgment under Rule 54(c) to which Rule 59(e) could apply until the evidentiary fee issue was resolved.

Respondents' theory also does not fit the facts of this case. As we pointed out in our opening brief, fees were initially discussed during

the settlement negotiations on the merits but such discussion was discontinued because, as respondents' counsel later conceded, "there was an ethical problem in discussion of the attorneys' fees," J.A. 88, in that it was unethical to "hold a class action or consent decree hostage for a waiver of attorneys' fees," *id.* at 69. *See generally* Pet. Br. at 3-5. Since respondents' attorneys thus were aware of the Fees Act, were familiar with the court decisions thereunder, and recognized that they could be subject to an award of fees, there thus was no prejudice to respondents whatsoever when petitioner's counsel initiated fee negotiations five days after entry of the consent decree, and later formally requested court-awarded fees.

Accordingly, under respondents' own theory and particularly in view of their concessions, the settlement decree resolving the merits of this case was not final and Rule 59(e) hence was inapplicable; the trial court thus acted within its jurisdiction in addressing and awarding fees, and the decision of the First Circuit must be reversed.

II. Despite Respondents' Altered Position, A Requirement Of Simultaneous Negotiation Of The Merits And Of Fees Imposes Ethical Conflicts

In the trial court, respondents were of the view that it was unethical to request petitioner's class counsel to engage in simultaneous negotiation of the merits and of fees. J.A. 69, 88. *See generally* Pet. Br. at 3-5. Nevertheless, in an attempt to provide some grounding for the First Circuit's "require[ment that] the parties face up to the issue of fees in their settlement negotiations," J.A. 106, respondents have now diametrically reversed their position.

In support of their new position, respondents incorrectly state that "[t]he approach followed by the First Circuit harmonizes with" *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1020-21 (3d Cir. 1977), and *Mendoza* v. *United States*, 623 F.2d 1338, 1352-53 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).[6] To the contrary, the Third

[6] Respondents also incorrectly rely on a statement, taken out of context, in the *Manual for Complex Litigation*. The relevant provision, omitted by respondents, is as follows: "When counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest." *Id.* at 1.46, *reprinted in* 1, Pt. 2, J. Moore, Federal Practice, 1.46, at 74 (2d ed. 1981).

Circuit in *Prandini* rejected simultaneous negotiation as unethical and held that only after "court approval" of a settlement on the merits "should discussion and negotiation of appropriate compensation for the attorneys begin." 557 F.2d at 1021. The consecutive negotiation procedure outlined in *Prandini* in fact was the precise procedure followed here, J.A. 45, 84, *see* Pet. Br. at 3, a procedure subsequently disapproved by the First Circuit in this case.

The simultaneous negotiation required by the First Circuit not only is in conflict with the court decisions in *Prandini*, *Mendoza*, and *Regalado* v. *Johnson*, 79 F.R.D. 447, 451 (N.D.Ill. 1978), but also is in conflict with the *only formal ethics opinion* on this matter of which counsel for petitioner are aware. *See* Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of the New York City Bar Association, 36 Record of N.Y.C.B.A. 507 (1981). As concluded therein, "we consider it unethical for defense counsel to attempt to negotiate the fee award under [fee-shifting] statutes simultaneously with the negotiation of the settlement of the merits." *Id.* at 511. For the convenience of the Court, a copy of this ethics opinion has been lodged with the Clerk of the Court.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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RICHARD H. WHITE,
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v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION AND THE MASSACHUSETTS BAR ASSOCIATION AS *AMICI CURIAE*

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5887

RICHARD H. WHITE,
PETITIONER,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION AND THE MASSACHUSETTS BAR ASSOCIATION AS *AMICI CURIAE*

Interest of Amici Curiae

The Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association ("Lawyers' Committee") was founded in 1968 as the first local affiliate of the National Lawyers' Committee for Civil Rights Under Law. Since 1973, it has been sponsored by the Boston Bar Association and private firms. The Lawyers' Committee draws upon the resources of

over twenty Boston law firms to provide representation in civil rights and law reform cases on behalf of minorities and poor people in Boston. The Lawyers' Committee is currently handling cases in the areas of housing and urban development, bilingual education, school desegregation, racial violence, equal employment opportunity, police misconduct and the rights of children, prisoners and the developmentally disabled. These cases frequently require hundreds of hours of lawyer time, and continue, in the implementation phase, for many years. Because the Lawyers' Committee receives no public funding, fee awards from successful litigation, including awards under 42 U.S.C. § 1988, are becoming a significant income source for the Lawyers' Committee.

The Massachusetts Bar Association ("MBA"), a voluntary association incorporated in 1911, represents over 11,000 Massachusetts attorneys and individuals concerned with the administration of justice. The MBA has actively supported and has itself developed a number of *pro bono publico* projects. As part of its Lawyer Referral Project, the MBA has established a *Pro Bono* Panel of some 550 lawyers who have agreed to accept *pro bono* cases, as well as an Employment Discrimination Panel and a Disability Law Panel. These projects reflect the MBA's recognition of a vast, unmet legal need, and are designed to encourage the private bar to participate in cases brought on behalf of the poor, minorities and the disabled.

Amici believe that affirmance of the procedural limitation on attorneys' fee awards imposed by the Court of Appeals for the First Circuit will impair the ability of entities such as *amici* to enlist the resources of the private bar to meet the legal needs of the poor and the disadvantaged. This limitation will deprive many deserving plaintiffs and their counsel of fee awards in pending cases, and will discourage competent counsel from undertaking complicated and costly civil rights litigation in the future. Further, it will inject the fee issue into settlement negotiations, making settlement of civil rights cases more difficult and creating an ethical dilemma for plaintiffs' counsel.

For the reasons set out below and in petitioner's brief, the Lawyers' Committee and the MBA urge this Court to reverse the decision of the Court of Appeals.*

Summary of Argument

I. In holding that an application for attorneys' fees under 42 U.S.C. § 1988 was governed by the ten-day limitation of Rule 59(e) of the Federal Rules of Civil Procedure, the Court of Appeals for the First Circuit disregarded the plain language of the statute, which provides for allowance of attorneys' fees "as part of the costs". This Court has previously construed Section 1988 as an amended definition of costs applicable to civil rights cases, making attorneys' fees in those cases just another item of costs. *Hutto* v. *Finney*, 437 U.S. 678 (1978). The surprising result reached by the First Circuit finds no support in the legislative history of Section 1988 and will subvert the remedial objectives of the statute.

The First Circuit's reasoning is based on a fundamental misconception of the relation between Section 1988 and the pertinent Federal Rules of Civil Procedure. The First Circuit incorrectly assumed that the reference to "costs" in Rule 54(d) was limited to the type of costs allowable generally under 28 U.S.C. § 1920. However, it was well understood when Rule 54(d) was adopted that the costs to be awarded in a case would often be determined by reference to cost provisions in the particular statute under which the suit was brought. Moreover, the draftsmen of Rule 54(d) recognized that, in many instances, these provisions defined "costs" to include attorneys' fees. Section 1988 is merely another federal statute, comparable to those adverted to by the draftsmen of Rule 54(d) in their notes, which contains such a cost provision. The First Circuit's conclusion also runs counter to the mandate of Rule 58, for it requires determination of costs prior to entry of judgment, even though logically that determination must follow the entry of judgment and even though the inevitable result will be to delay the entry of judgments. Such delay is particularly harmful in civil rights actions, where plaintiffs are often seeking

* The parties' letters of consent to the filing of this brief are being filed herewith pursuant to Supreme Court Rule 36.2.

equitable relief to cure on-going violations of the law and where the entry of judgment must be followed by implementation of the remedy. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 723 (1974). Finally, the First Circuit misapplied Rule 59(e), which was designed to permit the correction of erroneous judgments, not to establish a time limitation on fee applications.

II. The First Circuit also erred because the very nature of the inquiry involved in determining fees is such that a fee application involves a matter supplemental to the original proceeding on the merits. Fee applications necessitate the submission of evidence unrelated to the merits and frequently require separate evidentiary hearings after the decision on the merits. A proceeding to determine fees is, therefore, collateral to and independent of the merits, and not subject to time limitations for modification of judgments or decrees. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). *Cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980). The First Circuit's attempt to distinguish *Sprague*, on the ground that it involved only a claim for fees against a common fund, misses the point, because the Court's reasoning in *Sprague* turned on the nature of the Court's inquiry, and not on the basis of the Court's power to make the award.

III. The rule adopted by the First Circuit would require the simultaneous negotiation of settlement of the merits and of the fee award, placing plaintiffs' counsel in an untenable ethical position. Conscientious plaintiffs' counsel would be required to forego a deserved fee award altogether or to accept less than an appropriate amount rather than jeopardize an acceptable settlement of their clients' claims on the merits. Numerous courts have directed that negotiation of fees be deferred until after settlement of the underlying claims. *E.g.*, *Prandini* v. *National Tea Co.*, 557 F.2d 1015 (3rd Cir. 1977); *Mendoza* v. *United States*, 623 F.2d 1338 (9th Cir. 1980). The First Circuit's decision is insensitive to this issue; its affirmation would invite defendants to extract a waiver of fees as the cost of settlement, thereby undermining the objectives of Section 1988 and discouraging private firms from bringing meritorious civil rights suits.

IV. The First Circuit's rule is impractical and its adoption would discourage settlements, delay the implementation of relief and waste limited judicial resources. Counsel cannot be expected to make a full evidentiary presentation on a fee request within ten days of judgment; consequently, entry of final judgment and any appellate proceedings may be delayed needlessly while the collateral issue of fees is resolved. Also, by injecting the fee issue into settlement negotiations, the rule would delay and possibly jeopardize the settlement of important civil rights actions. Further, the rule would result in a waste of judicial resources, because its adoption would mean that more civil rights cases will go to trial, and that unnecessary hearings on fees will be required in cases in which the judgment is ultimately reversed on appeal.

V. If it adopts the First Circuit's rule, this Court should apply the rule prospectively only. To apply the rule retroactively to pending cases which have gone to judgment, but in which no fee application was made within ten days, would unfairly deprive plaintiffs and their counsel of fees, when counsel had reasonably relied on the plain language of Section 1988 and the weight of precedent, including this Court's decision in *Hutto* v. *Finney*, *supra*, treating fees as an item of taxable costs. This Court has not hesitated to limit its decisions to prospective application if applying the decision retroactively would produce "inequitable results." *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969).

Argument

I. Rule 59(e) Does Not Apply to an Application for Attorneys' Fees Pursuant to 42 U.S.C. § 1988, Because Congress Directed That Such Fees Be Allowed as Part of the Costs.

In ruling that an application for attorneys' fees under 42 U.S.C. § 1988 after entry of judgment may be barred by Rule 59(e) of the Federal Rules of Civil Procedure, the First Circuit has transformed an application for costs specifically allowed by statute into a motion to amend judgment. As a result, even though the Federal

Rules of Civil Procedure impose no time limitations on applications for costs, the court has created, out of the ten-day limitation of Rule 59(e), a rigid, jurisdictional limitation on applications for costs pursuant to Section 1988, as least insofar as one item of the costs is attorneys' fees. This surprising result runs counter to the clear and unambiguous language of Section 1988 and is based upon a misconception of the pertinent Federal Rules of Civil Procedure. There is no evidence that Congress, in enacting Section 1988, contemplated such an anomalous result; on the contrary, the First Circuit's decision contravenes the letter and spirit of the statute.

A. *Congress Intended That Attorneys' Fees Under Section 1988 Be Allowed as an Item of Costs.*

To resolve the issue in this case, this Court need look no further than to the express language of the statute. Section 1988 could not be any more explicit: attorneys' fees are to be allowed "as part of the costs". This phrase must be attributed some meaning, and it is difficult to imagine that Congress's reference to the "costs" was intended to suggest anything other than the "costs" referred to in Rules 54(d) and 58 of the Federal Rules of Civil Procedure.

Relying on the plain language of the statute, most courts which have addressed the timeliness of a fee application under Section 1988 have concluded that fees are costs and that the time limitation of Rule 59(e) does not apply. *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980); *Van Ooteghem* v. *Gray*, 628 F.2d 488 (5th Cir. 1980); *Jones* v. *Dealers Tractor and Equipment Co.*, 634 F.2d 180 (5th Cir. 1981); *Johnson* v. *Snyder*, 639 F.2d 316 (6th Cir. 1981); *Bond* v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980); *Anderson* v. *Morris*, 500 F.Supp. 1095 (D. Md. 1980). *See also Fox* v. *Parker*, 626 F.2d 351 (4th Cir. 1980) (rejecting Rule 59(e) argument raised for first time on appeal, even though valid Rule 59(e) objection would be jurisdictional). *Contra*, *Hirschkop* v. *Snead*, 475 F.Supp. 59 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149 (4th Cir. 1981); *cf. Obin* v. *District 9, Int'l Ass'n of Machinists*

and Aerospace Workers, No. 80-1315 (8th Cir., filed June 11, 1981) (attorneys' fees under Title VII not "costs" under Rule 54(d), but not subject to Rule 59(e) because fee award is collateral and independent matter).[1]

Although this Court has not yet addressed this precise issue, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), the Court construed Section 1988 as authorizing an award of attorneys' fees as an element of "costs". In *Hutto*, the Court upheld a Section 1988 award of attorneys' fees requiring payment out of state funds, notwithstanding an assertion of Eleventh Amendment immunity by the State. Emphasizing Congress's direction in Section 1988 that fees be awarded as "part of the costs", the Court relied on the traditional rule that the Eleventh Amendment immunity did not apply to costs and, therefore, rejected the State's assertion. *Id.* at 693-698.

The First Circuit viewed *Hutto* as irrelevant to whether Section 1988 fees were taxable costs within the meaning of Rules 54(d) and 58. 629 F.2d at 703. Yet the Court's reasoning in *Hutto* was predicated on an interpretation of Section 1988 as having made attorneys' fees just another item of costs and consequently within the traditional Eleventh Amendment exception for costs. With reference to Section 1988, the Court reasoned that Congress could

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[1] The First Circuit cited a number of cases outside the context of Section 1988 in support of its decision. 629 F.2d at 700 n.4. Only one of these cases, however, involved a statute which authorized the allowance of attorneys' fees as "costs". *Hill* v. *TVA*, 84 F.R.D. 226 (E.D. Tenn. 1979). This distinction is critical. *See* pp. 10-12, *infra*. The present authority of *Hill* is questionable, in view of the Sixth Circuit's decision in *Johnson* v. *Snyder*, *supra*. Also, in *Hill*, the application for fees came some twenty-eight months after the final judgment and a year after the completion of appellate proceedings; a delay of that magnitude may provide a basis for a discretionary denial of fees. *See* p. 16, n.14 *infra*.

Two other cases cited by the First Circuit, *Stacy* v. *Williams*, 466 F.2d 1366 (5th Cir. 1971) and *Laufenberg, Inc.* v. *Goldblatt Bros.*, 187 F.2d 823 (7th Cir. 1951), have also been superseded by court of appeals decisions in those circuits under Section 1988. See cases cited in text. Also, in *Stacy* v. *Williams*, *supra*, the district court expressly acknowledged that attorneys' fees may be taxable as "costs" if a federal statute so provides, in which case Rule 59(e) would not apply. *Stacy* v. *Williams*, 50 F.R.D. 52, 55 (N.D. Miss. 1970). *See also Lichtenstein* v. *Lichtenstein*, 55 F.R.D. 535, 537 (E.D. Pa. 1972), *rev'd on other grounds*, 481 F.2d 682 (3d Cir. 1973), *cert. denied* 414 U.S. 1144 (1974).

"amend its definition of taxable costs and have the amended class of costs apply to the States". 437 U.S. at 696. Illustrating this point, the Court pointed to other statutes which provide for allowance of attorneys' fees as an item of costs, including the attorneys' fee provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), and the more limited attorneys' "docket" fee set forth in 28 U.S.C. § 1923. 437 U.S. at 697 and notes 28 and 29. There was no hint in this analysis that the Court viewed Congress's "amended definition of taxable costs" as pertaining only to Eleventh Amendment issues and not to the procedural treatment of costs in the Federal Rules of Civil Procedure.[2]

The legislative history of Section 1988 confirms that Congress intended no distinction between an award of attorneys' fees and other items of costs. The Senate Report, referring to fees as "like other items of costs,"[3] cited *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1926), a case upholding an order requiring that costs be paid out of state funds. The costs awarded in that case were traditional items such as those listed in 28 U.S.C. § 1920. Congress thus saw itself, in enacting Section 1988, simply as expanding the list of costs which could be assessed against a party after judgment.

More generally, the legislative history of Section 1988 shows that Congress's overriding intent in enacting the statute was to facilitate the private enforcement of the civil rights laws by encouraging competent attorneys, through assurance of a fee award, to undertake civil rights litigation. *See* S. Rep. No. 94-1011 at 2, 6; H.R. Rep. No. 94-1558 at 9; 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy); 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney); *Maine* v. *Thiboutot*, 448 U.S. 1, 9 (1980); *cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980). Recognizing the broad, remedial objectives of the statute, Courts have construed Section 1988 liberally to further its purposes.[4]

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[2] Indeed, the Court specifically referred to Rule 54(d) in describing the circumstances in which "costs" will be awarded against a State. *Id.* at 695, n.24.

[3] S. Rep. No. 94-1011, 94th Cong., 2d Sess., p. 5 (1976).

[4] For example, the legislative history shows that "the bill is intended to apply to all cases pending on the date of enactment." H.R. Rep. No. 94-1558, p. 4 n.6.

The rule adopted by the First Circuit is a rigid, technical obstacle to recovery of attorneys' fees under Section 1988. It has little in the way of policy or logic to commend it, and it serves only to create a trap for the unwary.[5] Its acceptance by this Court will hinder the conduct of civil rights litigation and can only discourage future suits by sending the clear message that plaintiffs' attorneys bear the risk of narrow and unexpected construction of Section 1988. This Court should reverse the First Circuit's decision and hold, consistent with Congress's intent, that Section 1988 fee awards may be allowed as "part of the costs".

B. *The First Circuit's Decision Is Based Upon a Misunderstanding of the Design and Purpose of Rules 54(d), 58 and 59(e).*

1. *Rule 54(a) does not limit costs to the items specified in 28 U.S.C.* § 1920.

The First Circuit viewed the issue before it as whether attorneys' fees under Section 1988 were within "the specific type of costs recoverable after judgment under Fed. R. Civ. P. 54." 629 F.2d at 702. The Court began its analysis by quoting the provisions of 28 U.S.C. § 1920, which lists six traditional items of costs which may be taxed by a federal judge or clerk. The court then reasoned that attorneys' fees were "of a nature very different from" those costs, and, on that basis, concluded that attorneys' fees could not be treated as costs under Rule 54(d).

While the First Circuit's attempt to distinguish attorneys' fees under Section 1988 from items of costs listed in 28

Based on this statement, courts have applied Section 1938 to cases pending on appeal and, indeed, to cases in which the only unresolved issue is that of the fee award. *See Hutto* v. *Finney, supra*, at 694 n.23; *Fox* v. *Parker*, 626 F.2d 351, 354 (4th Cir. 1980); *Williams* v. *Alioto*, 625 F.2d 845, 849 (9th Cir. 1980); *Rainey* v. *Jackson State College*, 551 F.2d 672, 675-76 (5th Cir. 1977). Yet, if Rule 59(e) were applied, fees could not be awarded in any cases beyond the final judgment stage unless the appellate court directed that judgment be reopened.

[5] Even if counsel is aware of the rule, compliance may not be so easy. In major civil rights cases, given the many equitable decrees which may be entered and the likelihood of the district court's retaining jurisdiction to supervise implementation of its decrees, it may be less than clear whether or when "the judgment" was entered. Under the First Circuit's rule, if counsel errs in his or her interpretation, the chance to recover fees will be irretrievably lost.

U.S.C. § 1920 is debatable,[8] the fundamental fallacy in the First Circuit's reasoning lies in its assumption that the reference to "costs" in Rule 54(d) is limited to the type of costs included in 28 U.S.C. § 1920. On the contrary, Rule 54(d) was intended to permit recovery of whatever items of costs Congress might choose to identify, in particular statutes, as appropriate, under whatever circumstances Congress specified in those statutes. Indeed, as will be seen, it was well understood at the time of adoption of Rule 54(d) that Rule 54(d) would apply in cases where, under applicable statutes, attorneys' fees could be allowed as part of the costs. The enactment of Section 1988 represents simply another instance of Congress exercising its authority to supplement Rule 54(d) by specifying the items of costs recoverable in particular cases.

The draftsmen of Rule 54(d) recognized that a wide variety of federal statutes then in place addressed the matter of costs with

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[8] The First Circuit's emphasis on the "discretionary" and potentially controversial nature of an award of attorneys' fees is misleading. It ignores the fact that 28 U.S.C. § 1920 is itself discretionary, as is Rule 54(d). *See* 6 MOORE'S FEDERAL PRACTICE, ¶54.70[5] (1976). At the same time, a court's discretion in deciding whether to award attorneys' fees under Section 1988 is narrowly confined. The legislative history of Section 1988 made clear Congress's intent that the court's "discretion" in awarding fees was to be governed by the standard enunciated in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) — that is, that plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust". *See* S. Rep. No. 94-1011, p.4 (1976); H. Rep. No. 94-1558, p. 8 (1976). *See also* 122 Cong. Rec. 35128 (1976) (remarks of Rep. Sieberling) (fee award should be all but "automatic"); *Bond* v. *Stanton*, 630 F.2d 1231, 1233 (7th Cir. 1980); *Knighton* v. *Watkins*, 616 F.2d 795, 798 (5th Cir. 1980); *cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980). The First Circuit ignored this principle, erroneously stating that "even to determine whether . . . [a fee award] should be made at all, the district court must evaluate possibly a dozen diverse factors." 629 F.2d at 702. This evaluation relates not to the question *whether* to award fees, but only to determination of the *amount* of the fee award.

More generally, an allowance of both attorneys' fees under Section 1988 and the costs referred to in 28 U.S.C. § 1920 represent reimbursement of expenses incurred by a party in litigating a case to judgment, as distinguished from an element of damages to be proven at trial as part of a cause of action. *See Hutto* v. *Finney*, *supra* at 695 n.24. They are all part of the costs of suit and, thus, do not differ in "nature", even if they may differ in magnitude or ease of calculation.

respect to litigation arising under those statutes. The Notes of the Advisory Committee on Rules, prepared at the time of adoption of Rule 54(d), set out an extensive list of federal statutes providing for allowance of costs in particular cases. Federal Rules 104 (West 1980 ed.). The predecessor of 28 U.S.C. § 1920 (28 U.S.C. § 830 (1940)) was listed as but one among some forty-five sections of the United States Code dealing with costs which were said to be among the statutes "unaffected" by Rule 54(d).

A review of the statutes identified by the Advisory Committee confirms that the draftsmen of Rule 54(d) anticipated that costs allowable in cases governed by the Federal Rules of Civil Procedure would, in many instances, include attorneys' fees. Of the twenty-five "statutes as to costs" listed in the final paragraph of the Advisory Committee's Notes, no less than twelve made provision for allowance of attorneys' fees as part of the costs.[7] Congress's decision to refer to attorneys' fees as part of the "costs" in so many federal statutes should be taken as a direction to the courts to follow the same procedures in awarding attorneys' fees as would apply to other items of costs.[8]

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[7] Among the more familiar statutes in the Advisory Committee's list providing for allowance of attorneys' fees as part of the costs were actions under the antitrust laws, 15 U.S.C. § 15; actions under the Securities Act of 1933, 15 U.S.C. § 77k; actions under the Securities Exchange Act of 1934, 15 U.S.C. §§ 77i(e) and 78r; and actions under the Communications Act of 1934, 47 U.S.C. § 206. The others are: 7 U.S.C. § 210f (Packers and Stockyards Act); 7 U.S.C. § 499g(c) (Perishable Commodities Act); 15 U.S.C. § 72 (Unfair Competition Act); 45 U.S.C. § 153p (Railway Labor Act); 46 U.S.C. § 829 (Shipping Act); 46 U.S.C. § 1227 (Merchant Marine Act); 49 U.S.C. §16(2) (Interstate Commerce Act).

[8] In some of these statutes, Congress expressly provided that fees would be "taxed in the manner usually provided for taxing of costs . . .," Securities Act of 1933, 15 U.S.C. § 77k, whereas in others it simply stated that "costs" included attorneys' fees. Clearly, neither Congress, in occasionally stating that fees shall be taxed "in the (same) manner" as other costs, nor the draftsmen of Rule 54(d), in referencing, without distinguishing among them, the statutes awarding fees as costs, saw any procedural impediment or logical incongruity to treating fees like any other item of costs awarded by the court. Rule 54(d), when adopted, applied *pro tanto*, to the award of fees as costs under at least twelve federal statutes; there is no reason to assume it does not also apply to the award of fees as costs mandated by federal statutes enacted after its adoption.

Thus, "costs" under Rule 54(d) may include attorneys' fees if a specific statute so provides. It is only in the absence of a specific provision for costs applicable to the cause of action that the matter of costs is left to 28 U.S.C. §1920. That statute provides a starting point for determining costs,[9] but does not limit the types of costs allowable under Rule 54(d); any other applicable statutes also must be consulted to determine whether, in the particular case, Congress intended that additional items, such as attorneys' fees, be included as part of the costs.

In this case, Section 1988 is just such a statute, as this Court recognized in *Hutto* when it referred to Congress's authority to amend the definition of taxable costs to include attorneys' fees. 437 U.S. at 696-97. The First Circuit's analysis, resting entirely on potential distinctions between attorneys' fees and the types of costs specified in 28 U.S.C. § 1920, represents a misunderstanding of Rule 54(d) and its relation to the panoply of federal statutes providing for and defining costs in particular cases.[10]

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[9] As one commentator has observed, "if costs are to be awarded under Rule 54(d), they very likely will include *at least* the . . . items listed" in 28 U.S.C. §1920. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2670 at 158-59 (1973) (emphasis added). *See also* Peck, Taxation of Costs in the United States District Courts, 37 F.R.D. 481, 494 (1965).

[10] In support of its analysis, the First Circuit cited *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, (1980). However, that case did not involve an award of attorneys' fees under Section 1988 to a prevailing civil rights plaintiff "as part of the costs". The issue in that case concerned the penalty which could be imposed against an attorney pursuant to 28 U.S.C. § 1927, where the attorneys' conduct "increase[d] costs unreasonably and vexatiously." The Court there concluded that the enactment of Section 1988 and its counterpart in Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(k), were not intended to expand the types of costs which could be charged against an attorney under 28 U.S.C. § 1927.

In *Roadway Express*, the Court construed the reference to "costs" in 28 U.S.C. § 1927 as limited to costs of the type set forth in the predecessor to 28 U.S.C. § 1920, based on the contemporaneous understanding of "costs" in 1813, when 28 U.S.C. § 1927 was first enacted, and in 1853 when it was re-enacted. This reasoning does not apply to the reference to costs in Rule 54(d), because, as discussed above, the "contemporaneous understanding" of Rule 54(d) at the time of its adoption was that "costs" may include attorneys' fees if a specific statute so provided.

Roadway Express is distinguishable on another ground. In that case, the Court had to decide whether Congress intended, by the enactment of the attorneys' fee

2. *Rule 58 contemplates the determination of costs after entry of final judgment.*

The First Circuit's decision cited, but did not discuss, Rule 58. That Rule, providing that "[e]ntry of the judgment shall not be delayed for the taxing of costs" is fundamentally at odds with the First Circuit's rule requiring that a fee award be treated as part of the judgment and subject to Rule 59(e).

The sentence quoted above was added to Rule 58 in 1946. Its purpose was to emphasize that "judgments are to be entered promptly by the clerk without waiting for the taxing of costs", notwithstanding certain local rules to the contrary. Notes of Advisory Committee on Rules, in Federal Rules 109 (West 1980 ed.). This change in the rule made it clear that "the entry of a judgment and the taxation of costs are entirely separate legal actions". *Maryland Cas. Co.* v. *Jacobson*, 37 F.R.D. 427, 430 (W.D. Mo. 1965).

The separation of costs from the judgment is only logical, for, by their nature, the costs of suit cannot be determined until after the suit is complete in all respects:

> Until final judgment, the incidence of costs is not determinable, and any attempt to adjudicate the correctness of the items, at the instance of one party, might be futile, since the moving party might not be adjudged, by the final judgment, to pay the costs.

Parkerson v. *Borst*, 256 F. 827, 828 (5th Cir. 1919). This principle is implicit in Rule 54(d), since not until final judgment can it be

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provisions, to create a new and potentially substantial liability for attorneys engaged in civil rights litigation, a liability which might be assessed against attorneys for *plaintiffs* as well as defendants. The Court noted that such liability could discourage the bringing of civil rights actions, contrary to Congress's intent, and therefore it was hesitant to so apply the statute in civil rights cases. But in this case, there is no danger that treating fee awards as part of the "costs" referred to in Rules 54 and 58 would frustrate Congress's intent. On the contrary, it is the result reached by the First Circuit which runs counter to Congressional intent.

determined who is the "prevailing party". *See* Wright & Miller, Federal Practice and Procedure § 2679 at 239. Indeed, for that reason, taxation of costs is often deferred until after appeal. *Popeil Bros., Inc.* v. *Schick Electric, Inc.*, 516 F.2d 772, 777 (7th Cir. 1975); *Brennan* v. *Frisch Dixie, Inc.* 61 F.R.D. 419, 420 (W.D. Ky. 1973), *aff'd* 492 F.2d 1243 (6th Cir. 1974); *Fleischer* v. *A.A.P., Inc.*, 36 F.R.D. 31, 33 (S.D.N.Y. 1964).

This background shows that taxation of costs generally follows the entry of final judgment rules not, as asserted by the First Circuit, because costs are routine and noncontroversial, but rather, because, as a matter of sound judicial administration, it makes no sense to address the issue of costs until after final judgment. This reasoning applies with particular force to an award of fees under Section 1988.

As with many items of litigation expense, attorneys' fees under Section 1988 cannot finally be determined until the case is complete and judgment has been entered.[11] If the defendant appeals, the "prevailing party" issue may not be resolved until the completion of appellate proceedings. *See Anderson* v. *Morris*, 500 F. Supp. 1095, 1105 (D. Md. 1980). And, since a prevailing civil rights plaintiff is entitled to an award of fees for the appeal (*e.g.*, *Morrow* v. *Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978)), the total amount of the fee award cannot be determined before then.

Adoption of the First Circuit rule effectively reverses the order of judicial action contemplated by Rule 58 by pushing the award of costs *ahead* of entry of judgment. As a practical matter, the result will be to postpone the entry of judgment, contrary to the letter and purpose of Rule 58. *See Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580, 582 (3d Cir. 1960); Wright & Miller, Federal Practice and Procedure § 2785 at 18. As discussed in Part IV, any delay in entering judgment in civil rights cases is significant, for plaintiffs typically seek injunctive relief to remedy on-going violations of the law. Postponing entry of the judgment not only delays

[11] Interim fees, however, may be awarded *pendente lite*. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 722 (1974); S. Rep. 94-1011, p. 5 (1976).

the effectiveness of the court's order but also delays its implementation and enforcement. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 723 (1974) (noting that implementation of a school desegregation plan should not be deferred to await an application for and hearing on attorneys' fees). Contrary to the result required by the First Circuit, determination of fee awards should ordinarily *follow* entry of judgment, in accordance with the mandate of Rule 58.[18]

3. *Rule 59(e) was never intended as a time limitation on applications for attorneys' fees.*

The effect of the First Circuit's decision in this case is to turn Rule 59(e) into a time limitation for the filing of fee applications in civil rights cases. The draftsmen of Rule 59(e) never conceived of Rule 59(e) as serving this function. The provision was added to Rule 59 in 1946 — at the same time Rule 58 was amended — simply to confirm that a federal judge had power to alter or amend a judgment after its entry, an issue which had recently arisen in the Eighth Circuit in *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1944). *See* Notes of Advisory Committee on Rules, in Federal Rules 110 (West 1980 ed.).

There is no justification for applying Rule 59(e) to fee applications under Section 1988. Rule 59(e) only makes sense here if one assumes that the fee award *should* have been included in the judgment, and the judgment is being amended to correct an error or oversight. Yet the fees allowed under Section 1988 are not compensation for the injury giving rise to the action and, thus, they are not an element of a cause of action to be proved at trial. *See Hutto* v. *Finney*, *supra* at 695 n. 23; *Bond* v. *Stanton*, *supra*, 630 F.2d at 1233. As the court explained in *Knighton* v. *Watkins*, 616 F.2d 795, 797 (5th Cir. 1980):

[18] This approach is not without precedent. In England, where costs have traditionally included attorneys' fees, a separate hearing on attorneys' fees is held "after the litigation of substantive claims has terminated". *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 n.18 (1975); *see* Goodhart, Costs, 38 YALE L.J. 849, 855 (1929).

> a motion for attorneys' fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e).

Furthermore, as noted above, the attorneys' fees to be allowed under Section 1988 encompass not only legal expenses incurred in obtaining the judgment, but also compensation for the cost of appellate proceedings and even the cost of making application for fees. *See Morrow* v. *Dillard*, *supra*, 580 F.2d at 1300; *Bond* v. *Stanton*, *supra*, 630 F.2d at 1235. A rule requiring that a plaintiff apply for fees within ten days after entry of final judgment would preclude the district court's award of fees of this type. Such a rule is illogical and was never intended by the draftsmen of Section 1988.

The First Circuit's suggestion that application of Rule 59(e) furthers the goal of "finality" (629 F.2d at 804) ignores the reality of civil rights litigation. This type of litigation often continues for years after the entry of "final judgment," to ensure implementation and enforcement of an equitable decree.[13] The ten-day cut-off of Rule 59(e) makes little sense in this context, and, if applied, could jeopardize fee awards in such further proceedings.

Had Congress intended to impose a strict time limitation on the filing of fee applications in civil rights cases, it could easily have included such a provision in Section 1988. But, in the absence of such language, there is no basis for treating a rule relating to the correction of erroneous judgments as defining a time limitation for filing fee applications under Section 1988.[14]

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[13] For example, in *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972), proceedings before the district court are continuing some nine years after entry of the court's decree.

[14] The Federal Rules of Civil Procedure contain no specific time limitation for an application for costs, be they attorneys' fees or any other item of costs. A strict, arbitrary time limitation makes little sense, when it is frequently desirable to defer the matter of costs until after the completion of appellate proceedings. This is not to say, however, that the courts lack power to impose some limitations. Ordinarily, cases should not remain open indefinitely, and a lengthy and unjustified delay in filing for costs may provide grounds for the district court, in the exercise of its discretion, to deny an award of costs. *E.g.*, *United States* v. *Pinto*, 44 F.R.D. 357

II. An Application For Attorneys' Fees Under Section 1988 Is A Collateral And Independent Proceeding Which Is Not Subject To Rule 59(e).

If attorneys' fees under Section 1988 are not treated as an item of "costs" under Rule 54(d), neither can they be treated as an item of damages, to be proven at trial. The procedures which have evolved for determining a fee award require a separate proceeding, which may include an evidentiary hearing, in which the issues before the court are largely unrelated to the issues at trial. For these reasons, an application for attorneys' fees under Section 1988 constitutes a collateral and independent proceeding which is not subject to the limitations on amendments to judgments imposed by Rule 59(e).

The very distinctions which the First Circuit drew between fee awards and more traditional costs underscores the special nature of an application for attorneys' fees. As the court observed, proceedings concerned with fee awards require the district court to evaluate a dozen diverse factors. *E.g.*, *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied* 438 U.S. 916 (1978). Moreover, "the district court is generally assisted by submissions from the parties and frequently finds it necessary . . . to hold a hearing on the matter." 629 F.2d at 702.

A proceeding limited to determination of a fee award is exactly the sort of proceeding which traditionally has been viewed as "collateral" to and "independent" of the merits of the case. The doctrine had its origin in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), which, just like this case, concerned the timeliness of a claim for attorneys' fees. In *Sprague*, the petitioner had filed a separate petition for allowance of attorneys' fees, well after entry of final judgment on the merits of the case. The Court overruled the decision of the Court of Appeals for the First Circuit, which

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(W.D. Mich. 1968). The equitable doctrine of laches may be useful here; unless the defendant can show substantial prejudice, an otherwise proper award should not be denied. In general, a plaintiff should be afforded a reasonable period to apply for Section 1988 fees after all aspects of the case have been resolved or settled, and, if there are active efforts to settle the fee issue, this period should continue until after those efforts have terminated.

had held that the district court was powerless to act because petitioner had failed to assert the claim for fees within the period then permitted in equity suits for modification of the original decree. 307 U.S. at 169-70. The Court held:

> Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Court of Appeals — that it came after the end of the term at which the main decree was entered and therefore too late — falls.

Id. at 170.

The First Circuit attempted to distinguish *Sprague* as limited to the award of attorneys' fees in the so-called "common fund" cases. However, this Court's opinion in *Sprague* addressed two entirely separate issues: first, whether the federal court had *power* to allow attorneys' fees in the circumstances of the case, and second, whether the request for such fees was untimely. The Court's analysis of the second point did not depend on the source of the district court's power to award attorneys' fees. Instead, the Court, citing *Internal Improvement Fund* v. *Greenough*, 105 U.S. 527 (1882), emphasized that, in deciding whether to award fees, the district court's "inquiry was a collateral one, having a distinct and independent character." 307 U.S. at 169. The Court also observed that determination of the fee issue is placed "in much better perspective after the final disposition . . . including appeal", of the litigation. *Id.* The Court's reasoning was thus based on the nature of the inquiry, not the underlying basis for the fee award. The collateral and independent nature of that inquiry is no less true in the case of a fee application under Section 1988.

Following the reasoning of *Sprague*, the Court of Appeals for the Eighth Circuit has very recently held that a motion for attorneys' fees under Section 1988 "should be treated as a matter collateral to and independent of the merits of the litigation", so that Rule 59(e) does not apply. *Obin* v. *District 9, Int'l Ass'n of*

Machinists and Aerospace Workers, No. 80-1315 (8th Cir., filed June 11, 1981) (slip op. at 17). The court of appeals expressly rejected the First Circuit's analysis in this case, pointing out that "the same characteristics relied upon by the *White* court to distinguish fees from costs also distinguish fees from the merits of the action." Slip op. at 13-14.[15]

Although this Court has not yet had occasion to apply the *Sprague* rule to a claim for attorneys' fees under Section 1988, the Court's recent decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980) lends support to this approach. In *Carey*, the Court held that a Title VII plaintiff who prevailed in state administrative and judicial proceedings was entitled to an award of attorneys' fees in the United States District Court under the Title VII counterpart to Section 1988,[16] even though all aspects of the federal action were dismissed except the request for attorneys' fees. The Court concluded that Title VII's authorization of a civil suit in federal court "encompasses a suit solely to obtain an award of attorneys' fees for legal work done in state and local proceedings". *Id.* at 66. The Court thus viewed the proceeding to obtain attorneys' fees as entirely independent of the merits of the suit,

[15] While rejecting the application of Rule 59(e), the Eighth Circuit expressed its preference for considering appeals on fee questions together with any appeal from a final judgment on the merits. To this end, the court suggested that the district courts adopt rules requiring the filing of requests for attorneys' fees within twenty-one days after entry of judgment, so that the issue could be promptly decided and any appeals consolidated with appeals on the merits. However, such a rule would create the same practical problems as application of Rule 59(e)'s ten-day limitation and would result in a rigid procedural bar to recovery of fees. Furthermore, as discussed in Part I, in many cases the preferable procedure will be to defer the complicated fee analysis until after the completion of appellate proceedings. *See Sprague* v. *Ticonic Nat. Bank*, *supra* at 168; *Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980). Because the issue of fees is so different from the merits, there is less reason to be concerned about piecemeal appeals. In any event, in the context of fee awards, piecemeal appeals may simply be inevitable, given that fees for appellate proceedings cannot be fixed until after the completion of those proceedings, and that further fee awards may be made if the court retains jurisdiction to oversee implementation of its decree.

[16] Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). The Court referred to this provision and Section 1988 as "similar in purpose and design". *Id.* at 70 n.9.

which had been litigated in another forum. Following this reasoning, an application for fees under Section 1988 clearly may be considered in a proceeding collateral to and independent of the merits, and should not be treated as a request for a modification of the judgment on the merits.[17]

III. The Rule Adopted By The First Circuit Will Require That Settlement Negotiations Encompass Both Attorneys' Fees And The Merits, Creating Conflicts Of Interest And Undermining The Federal Policy Embodied In Section 1988.

The rule adopted in this case by the First Circuit has profound and disturbing implications for civil rights litigants and counsel who represent them. Some of the problems created by the rule were alluded to in Part I of this brief; others are discussed in greater detail in this and the following section. *Amici* urge the Court, in construing and applying Section 1988 in the present case, to be mindful of the significant practical and policy considerations which militate against adoption of the First Circuit's rule. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975).

One problem greatly exacerbated by the First Circuit's decision is the ethical dilemma faced by counsel for civil rights plaintiffs during settlement negotiations if counsel engage in simultaneous negotiation of both a consent decree and a fee award. There has been increasing recognition that such simultaneous negotiation

[17] The First Circuit interpreted the phrase "In any action or proceeding" in Section 1988 as a strong indication that the fee issue is properly viewed as "belonging within the main body of the already commenced civil rights action." 629 F.2d at 704. The statute involved in *Carey* used the identical language, yet the Court there did not require determination of the fee issue as part of the main body of the proceeding on the merits. The First Circuit did not cite *Carey* and apparently did not consider its implications.

tends to create a conflict of interest between attorney and client.[18] The conflict arises particularly in civil rights cases, where, as a practical matter, "a motion for fees and costs . . . , although made in the name of the plaintiff, is really one by the attorneys". *Regalado* v. *Johnson*, 74 F.R.D. 447, 451 (N.D. Ill. 1978).

The effect of the First Circuit's decision is to guarantee that this ethical problem will arise in every civil rights case in which settlement is even a possibility. The First Circuit itself saw its rule as "requiring the parties to face up to the issue of fees in their settlement negotiations." 629 F.2d at 705. According to the First Circuit, failure to confront the issue "merely muddies the waters". *Id.*

The First Circuit simply ignored the practical and ethical implications of its rule. *Amici* have found that, when the fee issue is injected into settlement negotiations, counsel for defendants frequently exploit the ethical dilemma faced by plaintiffs' counsel by offering a settlement which may satisfy plaintiffs' needs but is insufficient to adequately compensate counsel. Defendants' counsel may specify a very low amount for the fee, or may condition a settlement offer on counsel's complete waiver of fees. Civil rights litigation is particularly vulnerable to this tactic, for often the plaintiffs seek only injunctive relief, and the settlement offer may involve very little expense on the part of defendants, yet be perfectly acceptable to the plaintiffs. In these circumstances, plain-

[18] *See Mendoza* v. *United States*, 623 F.2d 1338, (9th Cir. 1980); *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1020-22 (3d Cir. 1977); *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 425-26 (7th Cir. 1977); *Lyon* v. *Arizona*, 80 F.R.D. 665, 667-69 (D. Ariz. 1978); *Regalado* v. *Johnson*, 79 F.R.D. 447, 451 (N.D. Ill. 1978); *Jamison* v. *Butcher & Sherrerd*, 68 F.R.D. 479, 484 (E.D. Pa. 1975); *City of Philadelphia* v. *Charles Pfizer & Co.*, 345 F.Supp. 454, 470-71 (S.D.N.Y. 1972); *Norman* v. *McKee*, 290 F. Supp. 29, 36 (N.D. Cal. 1968), *aff'd* 431 F.2d 769 (9th Cir. 1970); *see also* MANUAL FOR COMPLEX LITIGATION, § 1.46 at 74 (2d Ed. 1980) ("When counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest."); *see generally* Levin, Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in which Statutory Attorney's Fees Are Authorized, 14 CLEARINGHOUSE REV. 515 (1980); Developments In the Law — Class Actions, 89 HARV. L. REV. 1318, 1606-8 (1976).

tiffs' counsel is forced into a bargaining position inimical to the dictates of the Code of Professional Responsibility. Canon 5 of the Code imposes a duty on counsel to act solely for the benefit of the client, free of conflicting loyalties and compromising influences. *See* DR 5-101(A) (prohibiting acceptance of employment where lawyer's personal economic interests may reasonably affect the exercise of professional judgment on behalf of client); DR 5-103(A) (generally prohibiting lawyers from acquiring interest in litigation); *cf.* DR 5-107(A)(2) (prohibiting lawyers from accepting anything of value from third parties relating to representation of client). *See also* EC 5-1, 5-2; Canon 9 (lawyer "should avoid even the appearance of impropriety").

It is *amici*'s experience that, faced with this dilemma, responsible counsel conclude they have no choice but to accept the settlement offer, notwithstanding the inadequacy of fees or the forced waiver of fees. The First Circuit had no problem with this outcome, pointing out that plaintiffs' counsel may, rather than holding out against their clients' best interests, decide to "waive fees altogether." 629 F.2d at 705. But this result subverts Congress' intent that fees be awarded in order to attract competent counsel who will bring civil rights cases. *See* p. 8, *supra*. These cases are often complex, lengthy and very costly. Before agreeing to handle major civil rights litigation likely to involve a significant and long term commitment of resources, private law firms carefully evaluate the chances of prevailing on the merits and recovering fees. The prospect of simultaneous negotiation of fees and the merits, which predictably will result in reduced fees or no fees at all, will have a major impact on *amici*'s efforts to find firms which are willing to make that commitment.[19]

[19] Conversely, counsel for a defendant might offer to pay plaintiffs' counsel a lucrative fee, while offering less than adequate relief to the plaintiffs. One hopes that plaintiffs' counsel would not knowingly compromise the interests of his or her clients, but any time the fee offered is substantial, there may be an *appearance* of impropriety in accepting the offer. One court has disapproved concurrent negotiation of fees and the merits because of the "unfortunate impression that defendants [were] buying themselves out of a lawsuit by direct compensation to plaintiffs'

The only alternative suggested by the First Circuit, other than waiver of fees, was an agreement by the parties to submit the matter to the court for later determination. This suggestion is unrealistic. Given the choice, a defendant will always prefer the certainty of resolving the fee issue as part of an overall settlement rather than leaving it for later determination. Moreover, a defendant has no incentive to agree to this approach as long as there exists the possibility of forcing plaintiffs' counsel to accept reduced fees as a condition of settling the merits.

The only real solution to this problem is adoption of rules to discourage the simultaneous negotiation of fees and the merits. A number of courts have recently done just that. In *Prandini* v. *National Tea Co.*, 557 F.2d 1015 (3rd Cir. 1977), the Third Circuit decided that a

> reasonable solution . . . is for the trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation for attorneys begin.

Id. In *Mendoza* v. *United States*, 623 F.2d 1388 (9th Cir. 1980), the Ninth Circuit extended the *Prandini* rule to an action seeking injunctive relief, recognizing that the conflicts involved do not disappear where "there is no fund or money damages being negotiated." 623 F.2d at 1352. The *Mendoza* court concluded by "strongly discouraging the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations." *Id.* at 1353. *See also Regalado* v. *Johnson*, *supra*; *Lyon* v. *Arizona*, 80 F.R.D. 665, 667-69 (D. Ariz. 1978); *Munoz* v. *Arizona State University*, 80 F.R.D. 670, 671-72 (D. Ariz. 1978); *cf.*, *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977) (recommending but not requiring *Prandini* procedure).

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counsel." *Jamison* v. *Butcher & Sherrerd*, 68 F.R.D. 479, 484 (E.D. Pa. 1975). *See also Franks* v. *Kroger Co.*, 26 EPD ¶31876, 25 FEP Cases 1750 (6th Cir. 1981); *Foster* v. *Boise-Cascade, Inc.*, 420 F.Supp. 674, 686 (S.D. Tex. 1976).

The First Circuit disapproved a bifurcated procedure apparently out of concern for cases in which the matter of fees would go unmentioned in the settlement but then be raised unilaterally after entry of the consent decree. 629 F.2d at 705. The implication was that defendants ought to be protected from wily plaintiffs' lawyers, who would trick them into a consensual entry of judgment and then, out of the blue, move for an award of fees, perhaps in a very substantial amount. But this scenario can rarely, if ever, occur, and, in any event, the First Circuit's rule does not resolve the problem if it does exist.

As an initial matter, it is hard to believe that defendants' counsel can be imposed upon in this manner. A cursory review of the law will reveal to anyone that defendants are liable for fees under Section 1988 even after a settlement of the case. *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980); S. Rep. No. 94-1011, p. 5; *see* Annot., 43 A.L.R. Fed. 243, 285-89 (1979). There is no reasonable basis for a defendant to assume that a consent decree which does not mention fees implies a waiver of fees. *See Regalado* v. *Johnson*, *supra* (refusing to construe consent decree silent as to fees as agreement for no fees).

Furthermore, if counsel for plaintiffs intended all along to "trick" defendants' counsel, the First Circuit's rule would not remedy the problem. Plaintiffs' counsel could still obtain entry of the consent decree, and then, within ten days, move for a fee award.

More generally, any confusion as to the implications of a consent decree which is silent as to fees exists only because the procedures for negotiation of the merits and fees are not clearly delineated. In the present case, the Court has the opportunity to make clear that the matter of fees may be deferred until after entry of judgment, and that, where the case is settled, resolution of the fee issue *should* be deferred until after entry of the consent judgment. The Court will thus eliminate confusion as to the implications of a consent decree, remove the ethical dilemma faced by plaintiffs' counsel, and assure that the salutary purposes of Section 1988 will be effectuated.

IV. The Rule Adopted by the First Circuit Is Impractical and Will Discourage Settlement, Delay Final Resolution of the Merits and Waste Judicial Resources.

Apart from the ethical dilemma created by the First Circuit's rule, the rule is impractical and contrary to sound judicial administration. It is inconceivable that Congress could have intended these results in enacting Section 1988.

Adherence to the rule will impose substantial burdens on plaintiffs' counsel. Ordinarily, counsel would not expect to prepare a fee application prior to judgment. Since fees may be recovered only by "prevailing parties", it is wasteful of lawyers' time to prepare the necessary submissions before the outcome is known. Although counsel may be allowed fees for time spent in preparing these submissions, no fees at all will be allowed if plaintiffs lose on the merits. Also, there may be cases in which is is less than clear whether plaintiffs "prevailed". In those circumstances, the lawyers and their clients should have an opportunity to confer on whether to apply for fees at all.

Assuming the judgment is favorable and the decision is made to proceed with a fee application, counsel will have, if the First Circuit rule is adopted, only ten days to submit papers in support of the application. Counsel will need to prepare and file, within that time frame, a motion, supporting affidavits (addressing such matters as the time and labor required, the nature of the fee arrangement, the customary fee, and a multitude of other factors) and a legal memorandum. *See King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977). These materials must include "a full and specific accounting" of time, indicating the "dates and the nature of the work performed during the hour or hours in question." *Id.* at 1027.

Ten days is not sufficient time to confer with clients and compile these materials. Obtaining detailed time reports in that period may be an administrative impossibility for large private firms, especially if many lawyers have worked on the case and judgment is entered soon after trial. Furthermore, during that same period, plaintiffs' counsel will need to analyze the judgment itself and may

need to file a "true" motion to amend the judgment pursuant to Rule 59(e). Imposition of these burdens will make it more difficult to obtain fee awards and can only discourage attorneys from undertaking these cases in the first place.[20]

Adoption of the First Circuit's rule will also impose an obstacle to settlements. Injecting a potentially divisive issue like fees into settlement discussions on the merits will make negotiation of a consent decree more difficult, particularly if defendants refuse to consent to entry of a decree until the fee issue is resolved. Because civil rights litigation typically involves an effort to obtain injunctive relief, delays in achieving a settlement and in implementing a decree while the parties discuss fees may be of far-reaching significance. And, if the result of a controversy over fees is no settlement at all, the case will have to go to trial and the injunctive relief sought will be deferred.[21]

The First Circuit's rule will also delay the final resolution and implementation of litigated judgments. Because the rule encourages courts to enter a single, unified judgment, some courts may put off entry of a decree on the merits until the fee matter is heard and resolved, contrary to the principles embodied in Rule 58 and contrary to this Court's mandate that implementation of injunctive relief in civil rights cases must not be deferred to await resolution of fee issues. *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 723. And, even if judgment is entered prior to counsel's application for fees, a Rule 59(e) motion, followed by a hearing

[20] The First Circuit's rule could be construed as requiring only that a motion, without supporting papers, be filed within the ten-day period. If so, the burden on counsel is naturally less, but then the rule serves only a notice function, which is unnecessary since defendants are already on notice of Congress's intent that fees be awarded almost as a matter of course. Consequently, the rule would end up as nothing more than a trap for the unwary.

[21] In cases which are tried and in which plaintiffs prevail, the interests of the parties and of the courts are best served by negotiation of a settlement of the fee award. But such a settlement cannot be accomplished within the ten days after judgment. Accordingly, counsel will have no choice but to submit a prompt fee application in each case, thereby increasing their own costs and hardening their position with respect to settlement.

and eventual decision on the fee issue, will delay any appeal on the merits and defer the final resolution of the case. *See* Fed. R. App. P. 4(a)(4).

Finally, adoption of the First Circuit's rule will impose an increased burden on limited judicial resources. Because the rule discourages settlements, more cases will go to trial. Also, the rule will lead to an increased number of fee applications, since protective filings will have to be made before the question whether to file can be thoughtfully reviewed. And, once they are filed, fee applications are more likely to be pursued. The court will have to address the fee question both before and after appeals, even though the appeal may moot the issue altogether. *E.g.*, *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979). Finally, if fees are allowed following an appeal, there may be yet another appeal on the fee award. Plainly, sensible judicial administration dictates that fees not be confused with the judgment on the merits, so that the issue of fees may be addressed economically and efficiently at the appropriate time.

V. If the First Circuit Rule Is Adopted, It Should Not Be Applied Retroactively.

If this Court adopts the First Circuit's rule, the rule should be applied prospectively only, in order to avoid substantial hardship to plaintiffs and their attorneys who reasonably assumed that fees could be allowed after judgment as "part of the costs".

On a number of occasions, this Court has tempered the harshness of new procedural rules by invoking the doctrine of nonretroactive application. *E.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). As the Court observed in *Cipriano*,

> Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

395 U.S. at 706.

In the present circumstances, application of the rule to pending cases which have moved beyond the entry of judgment will result in a forfeiture of attorneys' fees which would otherwise be allowed under Section 1988. It is fair to assume that the decisions of the courts of appeals for the fifth, sixth and seventh circuits have encouraged lawyers to defer fee applications until the appropriate time for assessment of costs. Indeed, the fact that only the First Circuit has applied Rule 59(e) to fee applications confirms that adoption of its rule has not been "clearly foreshadowed". *See Chevron Oil Co.* v. *Huson, supra* at 106. On the contrary, the very language of Section 1988, and this Court's discussion of the statute in *Hutto*, provide reasonable grounds for anticipating the treatment of fees "as part of the costs".

Finally, there is no important policy to be furthered by applying the rule retroactively, and there are significant policies embodied in Section 1988 which will be subverted by denying fees to prevailing plaintiffs and their counsel who acted in reliance on the plain language of the statute. If the First Circuit rule is adopted, it should be applied only to cases in which judgment is entered subsequent to the publication of this Court's opinion.

Conclusion

For all the above reasons, the decision of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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July 23, 1981

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No. 80-5887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD H. WHITE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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No. 80-5887

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICHARD H. WHITE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al,,

Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For The First Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of the Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corpora-

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*/ Letters of consent to the filing of this Brief Amicus Curiae are on file with the Clerk of the Court.

tion incorporated under the laws of the State of New York in 1940. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties and has participated as amicus curiae in the federal courts in cases involving many facets of the law.

Attorneys employed by the Legal Defense Fund have participated in many of the leading cases involving attorneys' fees questions, both as counsel, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S 678 (1978); and as amicus curiae, e.g., Christiansburg Garment Co. v. Equal Employment Opportunity Comm., 434 U.S 412 (1978). Therefore, the Fund has a direct interest in the resolution of the issues raised in the present case.

SUMMARY OF ARGUMENT

I.

The holding of the First Circuit that counsel fee motions are motions to alter or amend a judgment and therefore must be

filed within 10 days of the entry of judgment, does not give proper consideration to the ethical problems facing counsel in negotiating the merits of their clients' case and their own fees simultaneously. In light of these problems, the result of a 10-day rule will be the otherwise unnecessary litigation of fee requests.

II.

It has been amicus' experience that fee requests are more likely to be resolved by settlement if they have been carefully prepared and fully documented. the time strictures imposed by Rule 59(e) will make such preparation virtually impossible. As a result, the trial courts are likely to be required to hold more hearings, with resulting greater costs to both the courts and the litigants.

ARGUMENT

As noted in the statement of interest above, the Legal Defense Fund has been involved in many of the leading cases here and in the lower courts that have set the standards for recovery of counsel fees in civil rights cases. Our interest in the issue is two-fold. First, the Fund is dependent upon the assistance of attorneys in private practice in carrying out its work. These attorneys are mostly in small firms or in solo practice, and therefore they cannot do civil rights cases on a non-paying basis since they do not have the income-generating base of a large firm. Second, over the last ten years an increasing proportion of the Fund's budget has come from the recovery of court costs and

fees; such recoveries constituted nearly 20% of its income in the years 1979-1980. The funds thus derived support the Fund's entire litigation program, including those cases in which fees were not recoverable.

The Fund, therefore, has had considerable experience in the practical, day-to-day litigation aspects of counsel fee recovery. We believe the Court will find our views as to the impact of the First Circuit's 10-day rule of value in deciding the issues presented by this case. We urge that Congress' clear intent was to facilitate and encourage fee recoveries to provide an incentive to the bringing of civil rights cases. Any rules that impede the carrying out of this intent must be viewed critically, so that any procedural rules governing fee applications will

be consonant with the overriding purpose of the fee statutes.

This brief, therefore, will address two critical problems that would result from the adoption of the position that a counsel fee application is, in effect, a motion to alter or amend a judgment, rather than a collateral matter relating to costs. These are, first, difficulties in settling counsel fee issues, and, second, difficulties in preparing adequate fee applications in a ten-day period. It is amicus' conviction that the First Circuit's rule will inevitably lead to burdening the courts with unnecessary litigation over fee applications.

I.

The Negotiation of Counsel Fees as Part of A Settlement of the Merits of a Case Is Improper

A major deficiency of the decision of the First Circuit is its failure to appreciate the ethical problems presented plaintiffs' attorneys in negotiating counsel fees at the same time as the merits of their clients' claims. While these problems exist even in cases involving individual plaintiffs, they are particularly acute in class actions, where a large number of unnamed class members are dependent on counsel not directly retained by them for the protection of their interests. Simply stated, the simultaneous negotiation of the merits and fees can place counsel in an inevitable conflict of interest with the clients, as has been recognized by the

Third[1] and Ninth[2] Circuits as well as by a number of district courts.[3]

Based on the experience of amicus in litigating hundreds of civil rights cases of all types, there is nothing abstract or hypothetical about this problem. It has arisen in many of the cases it has handled in a variety of contexts. Thus, it has not been uncommon for attorneys for a defendant in a fair employment case to offer a lump sum in settlement.[4] The amount would be represented to be the maximum the client would pay, and it was to be between

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1/ Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977).

2/ Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980).

3/ See, e.g., Regaldo v. Johnson, 79 F.R.D. 447, 451 (E.D. Ill. 1978); Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442, 448 (N.D. Ill. 1981).

4/ See, Mendoza v. United States, 623 F.2d at 1352-53, n.19.

plaintiffs and their lawyers to divide it up between themselves as they chose.

A variation on this approach is for defense counsel to request an "approximation" of the fees that would be sought, usually by giving an estimate of the number of hours that would be claimed. Settlement on the merits is conditioned on the approximated fee being "reasonable" in the view of the defendant. Finally, and most difficult for plaintiffs' counsel, are demands that all claims to counsel fees be abandoned as a condition for any settlement of the merits.

The ethical dilemma counsel is placed in in any of these situations is obvious. He or she is forced into weighing the interest of the client, whether in the size of the recovery or any recovery at all, in

obtaining certain relief by a settlement, and his or her own interest in obtaining adequate compensation for services rendered by uncertain litigation. It is impossible for an attorney to negotiate equally on behalf of such conflicting interests, particularly where one interest is his or her own.

It is no solution whatsoever to suggest, as did the court below, that plaintiff may "waive fees altogether". The fee statutes were enacted because Congress realized that without adequate compensation for attorneys, the substantive rights created by the various civil rights acts would not be enforced.[5/] The impact on

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5/ Sen. Rep. No. 94-1011, Civil Rights Attorneys' Fees Act of 1976 (94th Cong., 2d Sess.), p. 2. See also, Newman v. Piggie Park Enterprises, 390 U.S 400 (1968).

enforcement will be the same whether counsel is in private practice or connected with a public interest law organization that depends on fee recoveries for income to carry out its program.

Amicus itself has, in light of these problems, adopted the absolute position that it will not discuss fees in the course of settlement negotiations beyond agreeing to the inclusion of a provision that there is entitlement to them.[6/] If defendants will not agree to such language, then no more discussion is possible, and only the merits of the case will be negotiated. Under the First Circuit's rule, therefore,

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6/ The inclusion of such a provision, which does not specify any amount but which leaves it to later negotiation, is the best way to ensure that no conflict of interest between counsel and client will arise.

whenever plaintiffs' counsel attempts to avoid a conflict with the interests of the client, there will be only ten days in which to negotiate and prepare and file a fee application.

II.

The Ten-day Rule Will Make It Virtually Impossible To Avoid Otherwise Unnecessary Fee Litigation

It is clearly in the interest of all involved to negotiate fee awards wherever possible. Courts are thereby saved scarce time and resources (see, Copeland v. Marshall, 641 F.2d 880, 896, 905 (D.C. Cir. 1980); cf., New York Gaslight Club v. Carey, 447 U.S 54, 65, n.6 (1980)). Plaintiffs' counsel receive fees promptly, and defendants avoid increased fees resulting from the time spent litigating the fee issue itself. (See, e.g., Miller v.

Amusement Enterprises, 426 F.2d 534, 539 (5th Cir. 1970)). The First Circuit's ten-day rule is subversive of all these interests.

Under Rule 59(e), not only must the motion be filed within 10 days, but so must supporting affidavits and documentation. And, the time period is one of the few that may not be extended by the district court. Rule 6 (b), F.R. Civ. Proc.; see, Wolfsohn v. Hankin, 376 U.S. 204 (1964). Faced with the inexorable 10 day period, there will be virtually no time to negotiate fees effectively, since, in amicus' experience, negotiations are far more productive once a detailed statement of hours and rates has been submitted to opposing counsel.

The development of an adequate fee application, moreover, is more complex and

time-consuming than the court below seems to realize. Affidavits of all counsel must be prepared, along with detailed time-sheets, as well as affidavits of attorneys knowledgeable as to prevailing rates for comparable attorneys. It has been amicus' experience that meticulously prepared and thoroughly documented fee applications significantly reduce the time spent in litigating even contested applications, since they eliminate the need for extensive discovery and hearings before the Court to explore the factual underpinning for claimed fees. See, Copeland v. Marshall, 641 F.2d at 905 and n.57. Given time to prepare an application properly, a claim for fees is typically disposed of on the papers. If applications must be hurriedly prepared under unreasonable time constraints, the only result will be otherwise

unnecessary hearings and expenditure of precious court time.

In sum, it is amicus' view, based on years of handling numerous fee applications in civil rights cases, that the rule announced by the First Circuit will only result in the unjustified burdening of litigants and courts. The rule adopted by the Fifth Circuit,[7/] and followed by virtually every other court, is not only in accord with Sprague v. Ticonic National Bank, 307 U.S 161 (1939), but permits flexibility and greatly enhances the likelihood that fee disputes will be resolved thorough settlement by the parties, rather than by prolonged court proceedings.

7/ Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).

Conclusion

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

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July, 1981

No. 80-5887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD H. WHITE, *Petitioner,*

v.

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., *Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF THE COUNTY OF ROCKLAND, NEW YORK as *AMICUS CURIAE*

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IN THE

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On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF THE COUNTY OF ROCKLAND, NEW YORK as *AMICUS CURIAE*

CONSENT OF PARTIES

This brief is submitted in accordance with Rule 36.4 of the United States Supreme Court Rules by the County of Rockland, a political subdivision of New York State, by its authorized law officer, the County Attorney of Rockland County. In addition, the County Attorney has received consent from both Petitioner and Respondent to file this Brief. The County of Rockland supports the position of the Respondent and the opinion of the First Circuit Court of Appeals.

INTEREST OF AMICUS CURIAE

The interest of the County of Rockland in filing a brief amicus curiae is twofold.

First, as a municipal subdivision expending public funds, the County of Rockland contends that a final judgment ends litigation and the prevailing party must be

held strictly to the time limitations controlling discretionary awards of attorneys' fees. A party is entitled to recover attorneys' fees only when application is made in full compliance with the Rules of Federal Procedure.

A second and more specific reason for the filing of this brief is a pending motion for attorneys' fees in the case of *Finkel* v. *Branti* which was submitted to and is awaiting trial before Justice Vincent Broderick of the Southern District of New York. *Branti* v. *Finkel,* 445 U.S. 507, 631 L.Ed.2d 574, 100 S.Ct., 1287, was decided by this Court on March 31, 1980, in a six-to-three decision affirming the order of the Second Circuit Court of Appeals which affirmed the final judgment of the Southern District of New York. Four-and-a-half months after the affirming decision of this Court, the prevailing party, *for the first time,* applied for an award of attorney's fees. The County argues that, in the absence of any application whatever for attorney's fees during the pendency of the action, a judgment after trial, which is affirmed by the United States Supreme Court without remand, is an absolutely final judgment, and that a motion for counsel fees, made for the first time two-and-a-half years after the District Court judgment (which disposed of all the issues in the case) is barred by Rule 59(e) of the Federal Rules of Civil Procedure.

The issues before this Court on this appeal from the First Circuit decision in *White* v. *New Hampshire Dept. of Employment Security* presents an opportunity to reinforce the principle that a final judgment can only be amended or modified in strict conformance with the Rules of Federal Procedure, thus establishing a finite end to litigation and avoiding multiplicity of actions. Obviously, the decision of this Court in *White* could be entirely dispositive of the same issues in *Branti* and a multitude of other pending cases.

ARGUMENT

POINT I

The Judgment Entered By The District Court Was A Final Judgment Which Terminated The Action And Terminated Any Further Right To Seek Attorneys' Fees.

A final judgment is a judgment which decides all of the issues then before the Court in a pending case (see Rule 54(b), Federal Rules of Civil Procedure). After final judgment, counsel fees can only be added by a timely motion to amend the judgment. Rule 59(e) of the Federal Rules of Civil Procedure provides that a motion to alter or amend a judgment shall be served not later than ten days after entry of the judgment. Rule 6(b) provides that a court may not extend the time limitation established by Rule 59(e); *Moody* v. *U.S. Board of Parole,* 390 F. Supp. 1403 aff'd. 502 F. 2d 1165. Since the judgment on the consent decree in *White* was entered on January 26, 1979, the period within which a motion under Rule 59(e) could have been made, expired on February 5, 1979, and the motion, when made, was barred.

Fase v. *Seafarers' Welfare & Pension Plan,* 79 FRD 363 (Eastern District New York 1978) aff'd 589 F. 2d 112(1978) is the Second Circuit authority on this issue. It is also cited in the case of *Hirschkop* v. *Snead,* 475 F. Supp. 59 (Eastern District, Virginia 1979) aff'd. 646 F. 2d 149 (Fourth Circuit 1981) which is the Fourth Circuit authority. In *Fase,* plaintiff's motion for attorney's fees was not served until more than thirty days after the entry of judgment in his favor. The District Court stated "Plaintiff's motion for attorney's fees was not timely filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (F.R.C.P.) which requires that a motion to alter or amend a judgment be served within ten days after

entry of the final judgment." In the *Hirschkop* case, the Eastern District Court of Virginia entered judgment on April 2, 1979. On May 3, 1979, plaintiffs moved for an award of attorneys' fees under the Civil Rights Act. The Court stated: "The first question for the Court to consider is whether the judgment of April 2, 1979 is a final order or whether the failure of the Court to resolve the question of attorneys' fees in that order deprived that order of finality under Rule 59(e)," *Hirschkop* v. *Snead,* supra, at pg. 61. The plaintiff in that case argued that, because the Court had not determined the matter of attorneys' fees in its order of April 2nd, that order was not final for the purposes of 59(e). The Virginia Eastern District Court disagreed and, holding that there was a final order terminating the litigation, said: "The order of 2 April resolved all issues then before the Court and left nothing for the Court to do but execute the judgment. *Catlin* v. *U.S.,* 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L.Ed. 911 (1945)."

The judgment in *White* v. *New Hampshire* entered January 26, 1979 fully resolved all issues then before the Court notwithstanding that it did not award attorneys' fees. Since petitioners failed to preserve their rights by moving timely to alter or amend the judgment, "The defendant is entitled to the certainty and protection afforded by the Federal Rules on the scope and finality of judgments." *Fase* v. *Seafarers,* supra, at 367.

In a recent case, *Johnson* v. *University of Bridgeport,* 629 F. 2d 828 (Second Circuit 1980) the question was whether the judgment was final, thereby barring an application for attorney's fees. In *Johnson,* unlike this case, there had been a timely application for an award of attorney's fees which the Court failed to rule on. Therefore, the Circuit Court held that whether or not a

judgment is final depends upon the intent of the Court. In *Johnson,* the Court's failure to act on the motion for attorney's fees was construed as being indicative of the Court's intent that the judgment not be final. It would appear that the case also stands for the corollary that, absent a timely motion which is undecided or some other specific indication of the Court's intent to keep the matter open, the judgment is final and a subsequent application for attorney's fees is barred.

The case of *Branti* v. *Finkel,* supra, demonstrates the ultimate mischief that occurs when parties fail to adhere strictly to the Federal Rules of Civil Procedure. *Branti* was a case brought under 42 USC 1983 wherein there was no application made for attorney's fees in the complaint, or at any time prior to, or within ten days after, the Southern District judgment. Said judgment was affirmed by the Circuit Court of Appeals and this Court without remand. Two-and-a-half years after the District Court's final judgment, and nearly five months after the Supreme Court's affirmance, without remand, a motion for attorney's fees was made for the first time.

In the case at bar, this Court is being asked to approve similar belated procedures to reopen a final judgment. This case affords an opportunity for this Court to clarify when and in what manner a judgment becomes final. Rockland County contends that Rule 59(e) should be strictly construed and adhered to, as are other statutes which proscribe limitations of time for initiating actions. If this Court were to permit extension of the Rule 59(e) ten day limitation to 135 days in the case at bar, what would prevent the Courts from extending said time to two-and-a-half years in *Branti* or 10 years in another case?

POINT II

Petitioner's Claim For Attorneys' Fees Cannot Be Categorized As Independent Or Collateral And May Not Be Considered In A Separate Action.

In *Hirschkop* v. *Snead,* supra, plaintiff argued that his claim for attorney's fees was a collateral or independent claim which did not affect the finality of the order and thus, could be considered after the entry of judgment. The Court responded to that argument thusly: "One of the necessary attributes of a collateral claim is that it must be separable from the rights asserted in the main claim and neither affect nor be affected by the decision on the merits. *Wright, Miller & Cooper, Federal Practice & Procedures,* Section 3911, p. 470." Under that standard, it is clear that a discretionary award of attorney's fees under Section 1988 is not a collateral matter. An award of attorney's fees under 1988 is an award to the prevailing party (not the attorney) and is necessarily and exclusively made dependent upon the merits of the case. Such award is differentiated in *Hirschkop* from a fee award to the attorney directly in a "fund" case or an independent application (such as a Social Security matter); see *Johnson* v. *University of Bridgeport,* supra.

The same principles should be applied to the facts in the case at bar. Since petitioner's claim for attorney's fees was part of his main claim in this case, only a timely Rule 59(e) motion could have vested the Court with jurisdiction, after judgment, to hear his present application for an award of attorney's fees (See Point I infra.). Nor can the petitioners properly argue that their claim for attorney's fees is a collateral claim independent of the cause of action already adjudicated. Their claim for attorney's fees is grounded entirely on 42 U.S.C. 1988, a codification of the Civil Rights Attorney's Fee Award Act of 1976. An

analysis of the 1976 Act demonstrates the fallacy of such argument.

Prior to the 1976 Act, the courts were clearly divested of any jurisdiction to award attorneys fees after final judgment. Thus, in *DeBuit* v. *Hartwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976) it was held that the issue of attorneys' fees is a matter to be decided upon at the time of judgment and not to be left open pending appeal (See Appendix A attached). Five years earlier in *Stacy* v. *Williams* 446 F.2d 1366 (5th Cir. 1971), the Court held that costs in a judgment do not include attorneys' fees and the bill of costs could not be amended to include them (See Appendix A attached).

Following this, and in accord with this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society* 421 U.S. 240 (1975), the Civil Rights Attorney's Fee Award Act of 1976 was enacted. The legislative history of the 1976 Act clearly demonstrated that Congress did not intend to create any "startling new remedy" but merely to meet the technical requirements laid down in the earlier court decisions (See Appendix B, attached). Thus, the 1976 Act was not intended to create any independent collateral claim which was not then in existence.

Accordingly, any right the plaintiffs may have had to recover attorneys' fees was inseparable from their main claim and ceased to exist after judgment.

POINT III

Attorney Fee Awards Under 42 U.S.C. 1988 Are Not Costs Under Rule 54D.

In *White*, the First Circuit rejected the theory that attorney's fees are taxable costs under Rule 54(d). Although the 1976 Attorney's Fee Award Act permits the

Court, in its discretion, to allow attorneys' fees "as part of the costs," the Court should take judicial notice that attorney's fees differ substantially from costs ordinarily taxed by the *Clerk of the Court.* The costs usually allowable under Rule 54(d) (such as those having to do with printing, disbursements, etc.) are readily computable by the Clerk of the Court. In evaluating a request for attorney's fees, the Court must consider many issues such as the complexity and novelty of the legal question, customary fees in the area, and the skill and experience required to present the case. The taxing of ordinary costs does not usually forment controversy between the parties. However, an attorneys' fee award usually requires a contested hearing before the Court. Thus, attorneys' fees cannot be equated with taxable costs. See *Gary* v. *Spires,* 634 F.2d 772 (4th Cir. 1980).

Nor may petitioner argue that the time to apply for attorneys' fees has not expired because the time to file a bill of costs has not expired. "A bill of costs shall be filed in the case and, upon allowance included in the judgment or decree," 28 U.S.C 1920. To include costs in the "judgment or decree" means they must have been taxed prior to final judgment. Thus, where a *final* judgment has been entered, no bill of costs can be later filed.

CONCLUSION

Every action or proceeding must have a finite end. The jurisdiction of the Court is invoked to seek specific relief which is spelled out in the pleadings. The ultimate judgment either grants or denies the relief sought. Attorneys' fees are awardable by the Court to a prevailing party who makes a timely request in an appropriate case. If no request is made before judgment (or within ten days thereafter), the judgment has determined all of the issues in the case and becomes final and the case is finished. To permit a final judgment to be modified after expiration of the statutory time limitations, means the case is never really concluded. In the case at bar, there was a trial, a judgment, and no timely application to modify the judgment.

Accordingly, this Court should affirm the decision of the First Circuit Court of Appeals, and reject the decision of the Fifth Circuit in the case of *Knighton* v. *Watkins* 616 F.2d 795 (5th Cir. 1980), by holding that Rule 59(e) bars a motion for attorneys' fees made later than ten days after judgment is entered and an untimely motion to amend the final judgment must be denied.*

Respectfully submitted,

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*In order to be timely, the County of Rockland is compelled to file this brief prior to petitioners' brief being served upon us. We may therefore seek to file a supplemental brief after a review of petitioners' brief.

APPENDIX

APPENDIX A

ATTORNEYS FEES CLAIMS PRIOR TO ENACTMENT OF THE 1976 ACT

But for the 1976 Act, this Court clearly would lack jurisdiction over this claim. *DuBuit* v. *Hartwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976); *Stacy* v. *Williams*, 446 F.2d 1366 (5th Cir. 1971).

DuBuit, supra, arose out of a patent infringement suit; the 1976 Act was inapplicable. On October 26, 1972, the Court entered judgment that the plaintiffs' patent was valid, but not infringed. The judgment was silent on attorneys' fees.

On November 2, 1972, the defendants filed a timely motion for amendment of the judgment under Rule 59(e), and moved for attorneys' fees. Next day, the plaintiffs moved for amendment of the judgment order, but they did not seek attorney's fees. On November 30, 1972, the District Court denied the defendants' amendatory motion, but it did not rule on their motion for attorney's fees. The Court granted the plaintiffs' motion in certain limited respects. The case was complicated by the fact that, on December 15, 1972, one of the three plaintiffs appealed from the judgment with respect to issues that had been resolved against him. The Fourth Circuit affirmed the District Court's judgment on October 15, 1973. On March 22, 1974, defendants filed a document entitled "Supplemental Affidavit in Support of Renewed Motion for Attorney's Fees and Expenses," and the District Court awarded them attorney's fees on November 5, 1974.

The Fourth Circuit reversed the award, concluding that, for several reasons, the District Court had no jurisdiction to consider the motion. First, the District Court's denial of the defendants' Rule 59(e) motion on November 30, 1972, had effectively disposed of the defendants' motion for attorney's fees as well. Although the District Court had not expressly addressed the fee issue, the Court of Appeals refused to accept "defendants' contention that the jurisdiction of the Court could be preserved by correspondence or statements dehors the official record." *Id.* at 693.

Second, the Court of Appeals disagreed with the District Court's statement that it retained authority to award the fees because the issue had been deferred pending the outcome of the plaintiff's appeal: "The issue of attorney's fees should have been considered and disposed of either prior to or at the time of the entry of final judgment in this case and not left open pending outcome of the appeal." *Id.* at 694.

Finally, when the Fourth Circuit affirmed the final judgment, "this put an end to the litigation and the District Court had no authority to reopen the case for the consideration of attorney's fees or any other purpose." *Id.* The defendants made their renewed efforts to obtain attorney's fees more than two years after the original judgment, and one year after that judgment had been affirmed — clearly outside the limit set by Rule 59(e).

Thus, in *Du Buit,* the Fourth Circuit considered denial of a Rule 59(e) amendatory motion equivalent to a denial of a motion for attorney's fees. The opinion also made it clear that the issue of attorney's fees should be resolved before final judgment, or by a proper motion to alter or amend the judgment.

Stacy v. *Williams,* 50 F.R.D. 52 (N.D. Miss. 1970), *aff'd,* 446 F.2d 1366 (5th Cir. 1971), stemmed from an earlier action in which the plaintiffs sought a declaratory judgment, pursuant to 28 U.S.C. § 2201, that certain uniform regulations restricting speakers on Mississippi college campuses were unconstitutionally vague, and violated the First Amendment. *Stacy* v. *Williams,* 306 F.Supp. 963 (1970). The District Court entered judgment for the plaintiffs on December 1, 1970, and the judgment decree directed that all "costs [of the suit] be taxed against the defendants." *Id.* at 964. On February 11, 1970, plaintiffs filed a motion to amend their bill of costs, submitted on December 9, 1970, and for allowance of attorney's fees. The District Court denied the motion because it had not been filed within the ten day limit of Rule 59(e). Citing *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714

(1967), the Court said that the reference to "costs" in the judgment decree did not include attorney's fees, and that the bill of costs could not be amended to include them. The Fifth Circuit affirmed the District Court's application of Rule 59(e) as "clearly correct," and quoted the following language from the District Court Opinion:

> That rule is particularly applicable to a motion to alter or amend a judgment to allow attorney's fees which were neither asked for before judgment nor mentioned in the judgment. We are not concerned here with correcting a mere clerical mistake in the terms of the judgment, but with granting new substantive relief, and the motion therefore must comply with Rule 59(E). (citation omitted)

Stacy v. *Williams*, 446 F.2d 1366 (5th Cir. 1971) at 1367.

APPENDIX B

THE 1976 ACT DOES NOT CREATE A NEW REMEDY

It may be argued that the 1976 Act somehow creates a new, independent claim for attorney's fees, standing apart from any remedies available in the main proceeding in this case. This position is contradicted by the legislative history behind the 1976 Act.

The 1976 Act began as S. 2278. Because the Senate version of the bill was passed in lieu of the House version, the Senate Report (Judiciary Committee) No. 94-1011 is particularly instructive. That report clearly indicates that the sole purpose of the act was to

> remedy anamalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws.

S. Rep. No. 94-1011, 94th Cong. 2d Sess. reprinted in (1976) U.S. Code Cong. & Ad. News 5908, 5909.

The Senate Report also discussed similar statutes that had long been in existence.

> In cases under these [similar] laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies.

Id. at 5910 (emphasis added).

> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an *integral part of the remedies necessary to obtain such compliance.* Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5.

Id. at 5913 (emphasis added).

> This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if Federal Courts are to continue the practice of awarding attorney's fees which had been going on for years prior to [Alyeska].

Id.

Clearly, the 1976 Act was not intended to create any independent, collateral claim.

(Appendix A and B have been taken from Defendants' memorandum in the case of *Hirschkop* v. *Snead*, filed in the Eastern District of Virginia)